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BY

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SIR CHARLES RUSSELL, Q.C., M.P.,

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PREFACE.

THE following pages deal with the law relating to Civil Engineers, Architects, and Contractors. Several treatises already exist in which different branches of the same subject are treated of with much learning and in great detail, but none of these deal exclusively and completely with this subject, and, moreover, they are all, strictly speaking, technical works, intended solely for the use of trained lawyers. The authors of this work believe that there is urgent need of a brief summary of the law fitted for the use of the Civil Engineer, Architect, or Contractor himself, and they trust that in the following pages that need will be found to be adequately met.

The work being primarily intended for the use of persons who have not had a strict legal training, the authors have in it departed from the usual methods of law writers in two respects. In the first place, they have, as far as they could do so consistently with clearness and accuracy, avoided the use of technical terms and technical modes of

expression. In the second place, they have been careful to cite the more important cases at considerable length in order that readers who have not a law library at hand for reference may be better able to judge for themselves of the precise bearing of the decisions.

In conclusion, though, as has been said, the work is primarily intended for the classes with whose legal rights and duties it deals, still the authors venture to hope that it will also prove useful to practising lawyers. Every effort has been made to render it as comprehensive and accurate as possible, and though, no doubt, some errors will be discovered, still they trust that on the whole it will be found a clear and reliable statement of the law.

L. LIVINGSTON MACASSEY.

J. A. STRAHAN.

5, TEMPLE GARDENS, E.C.

June, 1890.

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Introductory.—THE employment of a civil engineer or architect has usually for its object that he should afford advice to the client; that he should design the works proposed to be carried out, and that he should superintend them during their construction. There are, of course, many other matters which are frequently undertaken by the members of the two professions. For instance, the civil engineer may be employed to give evidence before a parliamentary committee on the merits of a proposed railway or harbour, or before a court of law in a case of a

dispute arising out of a contract for works. And in the same way an architect or surveyor may be retained to speak as to the value of property taken compulsorily, or to report on the value of land about to be mortgaged. But these may be regarded as rather exceptional in their character and occurrence.

Verbal Agreements.—When the engineer or architect is employed by an individual, a written agreement is not necessary. The retainer may be, and very frequently is, merely verbal. The client calls at the office of the professional man whom he wishes to employ, and the latter generally writes the instructions in his diary. In case of any dispute arising afterwards, it can generally be shown that there has been a valid contract entered into from the instructions given and acted on, and from the acts and conduct of the parties. Doubts and difficulties are, however, much less likely to arise if there is a written contract, and this should always be insisted on by professional men.

Agreement not to be performed within a year.—When the employment is of such a character that the work to be done is not to be completed within a year from the date of the retainer, a verbal agreement is not sufficient. Such an agreement is not invalid, but it cannot be enforced at law. There must be a memorandum of the transaction signed by the party to be chargeable thereunder. This is prescribed by the 4th section of the Statute of Frauds, which is as follows :—

29 Car. 2,
c. 3, s. 4.

“No action shall be brought . . . upon any agreement which is not to be performed in the space of one year from the making thereof . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.”

But it does not follow that a verbal agreement cannot be sued upon, merely because the work done under it has occupied more than a year in its completion. The agreement requires to be written only when, from the nature of the work or the terms of the agreement, it cannot be or is not to be performed on either side within a year.

Thus, in *Peter v. Compton*, the defendant agreed with the plaintiff that he would give him 1,000 guineas on his wedding-day, if the plaintiff would give him a guinea now. Two years afterwards the plaintiff married, and claimed the 1,000 guineas. The defendant, however, resisted the claim, on the ground that the 4th section of the Statute of Frauds required that an agreement, which is not to be performed within the space of one year from the making thereof, must be in writing if to be sued upon. The defendant, however, did not succeed in his contention; for it was held that the statute only applies to agreements which are in their terms incapable of being performed within a year. And there was nothing in the nature of the case to prevent the plaintiff marrying at any time after the date of the agreement. Skin. 353.
(1690)

Again, in *Britain v. Rossiter*, which was an action for wrongful dismissal, the plaintiff entered the defendant's service as clerk and accountant. The agreement was made on a Saturday, and the plaintiff was to begin work on the following Monday, and to serve for one year from the Monday. The plaintiff remained at work for some months, and was then dismissed without notice. On the trial of the case the defendant relied upon the 4th section of the Statute of Frauds, the contract of service not being in writing, and it was held by the Court of Appeal (Brett, Thesiger, and Cotton, L.JJ.) that the case came within the Statute of Frauds, and that the contract, not being in writing, could not be enforced. L. R. 11 Q. B.
D. 123. (1879)

29 Car. 2,
c. 3, s. 4.

It will be observed that in the case of *Peter v. Compton* the Court laid no weight on the point that the plaintiff had paid the defendant the guinea, and therefore performed his part of the contract, within a year. According, however, to modern doctrine, this would be a sufficient ground for excluding the statute. It is now held that the statute only applies to agreements not to be performed on either side within a year.

This was decided in the case of *Smith v. Neale*. There the 2 C. B. (N. S.)
67. (1857)

plaintiff was the inventor of a certain new method of making toys. The patent of this she sold and transferred to the defendant, he undertaking to pay her a certain royalty every year, and, besides, to pay all the patent fees which might become due. Defendant failed to carry out his part of the agreement. The Court (Willes, J.) held that the contract being intended to be, and having been, fully performed on one side (the plaintiff's) within a year, it was not within the statute. (See also *Donellan v. Read.*)

3 B. & Ad.
899. (1832)

In this case a further question arose as to what was a sufficient "note or memorandum in writing" to satisfy the statute. The only evidence of the contract there was a letter to the plaintiff from the defendant, and signed by him, to which the plaintiff had verbally assented. This, the Court held, was, as against the defendant, sufficient, as the statute required the memorandum to be signed "by the party to be charged therewith"; the fact that the plaintiff had not signed it being held not to affect her right of suing the defendant on the contract, though it would prevent him from suing her.

Besides being signed by the party to be charged therewith, the memorandum should also contain the names or a sufficient description of the parties to the agreement (39 Ch. D. 508. (*Lavery v. Pursell*), and a statement of the terms of it on both sides. This latter point is important, since it has been decided in the case of

39 Ch. D. 508.
(1888)

5 East, 10.
(1804)

Wain v. Warlters that if the memorandum does not contain, not only the work to be done, but the consideration for doing it, it is not a sufficient note or memorandum of the agreement to satisfy the statute.

It will be seen from a perusal of the foregoing cases that if the work to be done under an agreement will, as a matter of necessity, or of agreement, occupy more than a year in its performance, unless the consideration is given beforehand, the agreement should be in writing. On the other hand, when the matter to be executed can be completed within a year, even though, as a matter of fact,

it occupies more than a year, a verbal agreement will be sufficient to support an action.

Suppose, for illustration, that an engineer is employed to lay out and superintend the construction of a tramway; whether his retainer should be in writing would depend on the length of time contemplated for the construction of the works. If, when the engineer was retained, a period of more than a year was expressly named, writing would, of course, be necessary. But if no period was expressly named, then whether writing was necessary or not would depend on the intention of the parties, and for the purpose of ascertaining that intention the fact that the contract with the person employed to construct the tramway provided that the time allowed for completion was, say, two years, would be material evidence.

Corporations.—Civil engineers and architects are frequently employed by corporations, and when this is the case, further precautions are necessary to render them certain of their fees. It is a general rule of law that corporations can only contract under their common seal. It is well that professional men should have this clearly before them, as in many cases engineers and architects have failed in recovering their fees, after spending a good deal of time and money in the service of a corporation. An instruction from a mayor, town clerk, or from a committee, or, in fact, a resolution from the corporation duly passed, will not enable the professional man acting under it to recover payment for his services, in case the corporation choose to resist his claim, and plead that the agreement was not under seal.

There are, however, exceptions to the general rule, which may be referred to, though the employment of engineers and architects is not of such a character as to bring their cases within them. These exceptions are all based on this

6 A. & E. 846.
(1837)
See *Pollock on*
Contracts,
5th ed.,
p. 147.

principle, that where "convenience amounting almost to necessity" requires it, corporations may bind themselves by contracts not under their common seal. (*Church v. Imperial Gas, &c. Co.*) What the Court will consider convenience amounting almost to necessity, depends largely on the nature of the corporation in question. In the case of municipal and other public corporations not created for a special public purpose, the convenience must be of the most obvious and pressing kind. Such bodies can legally bind themselves without seal only in trifling matters of constant occurrence, such as the employment of workmen, the engagement of inferior servants—the appointment of higher officials must always be by deed—or in matters of urgency, which will not admit of the delay necessary for the preparation of a formal sealed contract. As a strong example of the latter,

L. R. 10 C. P.
402. (1875)

The case of *Wells v. Mayor, &c. of Kingston-upon-Hull* may be mentioned. Here defendants, the Corporation of Kingston, were owners of a graving dock, the use of which they allowed, subject to certain regulations, to ships needing repairs. By these regulations ships seeking admission to the dock were to be entered in a book kept by the borough treasurer, and they were to be admitted as far as possible according to the date of their respective entries. Plaintiff agreed verbally to the defendants' terms, and entered his ship for admission. She was not admitted in her turn. Plaintiff brought an action for breach of contract, and the Court held, that though his agreement with the defendants was not under their common seal still he was entitled to recover on it.

This appears to be the furthest the principle of "convenience amounting almost to necessity" has been carried with regard to corporations not created for any special public purpose. And it is to be observed, that in this case the corporation might be considered as acting as a trading body.

But if this principle is applied strictly to corporations not created for any special public purpose, it is applied

with much liberality to public corporations created for specific purposes and to trading corporations. The rule here appears to be, that such corporations as these may bind themselves by a contract not under seal as regards anything which is necessary or incidental to the proper discharge of the functions which they were created to perform, or the business which they were formed to carry on. (*South of Ireland Colliery Co. v. Waddle.*)

As an example of the application of this rule to non-trading corporations created for a definite purpose, it is proper to cite the case of

L. R. 3 C. P.
463, and 4
C. P. 617;
38 L. J. C. P.
338. (1868)

Nicholson v. Bradfield Union (Guardians). The plaintiff in this case supplied the defendants, guardians of the poor, with coal for their workhouse under articles of agreement executed by the plaintiff, but not sealed by the defendants. On an action by the plaintiff for the price of the coals so supplied, judgment was given in his favour, the Court holding that the coals were necessary for the proper discharge of the defendants' duties as guardians of the poor, and, such being the case, a contract for their supply need not be under seal to be binding upon them.

L. R. 1 Q. B.
620; 35 L. J.
Q. B. 176.
(1866)

The case of *Clarke v. Cuckfield Union* is another on the same point. There the plaintiff erected water-closets in the defendants' workhouse. The contract under which they were erected was not sealed by the defendants. Nevertheless on action for their price the plaintiff was held entitled to recover.

21 L. J. Q. B.
349. (1852)

With regard to trading corporations, it is necessary to cite only one case.

In *Henderson v. The Australian Royal Mail Steam Navigation Company*, the defendants were a steamship company carrying passengers to Australia. The plaintiff supplied them with ale for the consumption of the passengers on the voyage. Though the contract by which it was supplied was not under the defendants' seal, still it was held that, as a supply of ale for the passengers was necessary for the proper discharge of the business the company was formed to carry on, the price of it could be recovered by the plaintiff.

5 El. & Bl.
409. (1855)

Before leaving this subject, two cases may be mentioned

where the plaintiffs failed to recover because their contracts were not under seal. The first is that of

4 M. & Gr.
860. (1842)

Arnold v. The Mayor of Poole, where the plaintiff claimed payment of his fees as solicitor in respect of professional services rendered to the corporation of Poole. The work was authorized by resolution, and was proceeded with to the knowledge of the defendant corporation. The latter resisted the claim on the ground that there was no contract under seal, and the plaintiff was defeated.

L. R. 7 Ch.
App. 562.
(1872)

In *Crompton v. Varna Railway Company*, the plaintiff was the contractor for making a line of railway, and required, for his own purposes, to erect cottages on the company's land. He was requested by the agent of the defendant company to make the cottages more substantial than he intended, with a view to their being taken over by the company after the works were completed, and the agent promised that the company would pay him 5,000*l.* for them. The agreement was afterwards confirmed by a resolution of the board of directors. The company eventually repudiated the bargain, which was not under seal, and the plaintiff, on bringing an action upon it, was defeated.

Besides these exceptions at common law to the general rule as to the common seal being necessary in the case of contracts by corporations, that rule has also been of late relaxed on certain occasions by statute.

Contracts with Joint Stock Companies.—The first of these statutory relaxations which may be mentioned is with regard to joint stock companies registered under the Companies Act of 1862. The provisions of the Companies Act, 1867, with regard to contracts by them are as follows :

“ *Contracts.*

30 & 31 Vict.
c. 131, s. 37.

“ Contracts on behalf of any company under the principal Act (1862) may be made as follows : that is to say—

“ (1.) Any contract which if made between private persons would be by law required to be in writing, and if made according to English law to be under seal, may be made on behalf of the company in writing, under the common seal of the company, and such contract may be in the same manner varied or discharged ;

- “(2.) Any contract which if made between private persons would be by law required to be in writing, and signed by the parties to be charged therewith, may be made on behalf of the company in writing, signed by any person acting under the express or implied authority of the company, and such contract may in the same manner be varied or discharged ;
- “(3.) Any contract which if made between private persons would by law be valid, although made by parol only and not reduced into writing, may be made by parol on behalf of the company by any person acting under the express or implied authority of the company, and such contract may in the same way be varied or discharged ;
- “and all contracts made according to the provisions herein contained shall be effectual in law, and shall be binding upon the company and their successors, and all other parties thereto, their heirs, executors or administrators, as the case may be.”

The effect of this enactment is practically to put a joint stock company, as far as contracts are concerned, exactly in the position of an individual contracting through an agent. Whatever would be considered a sufficient authority to constitute a person the agent of an individual for the purpose of making certain contracts, is sufficient to constitute a person the agent or officer of a company for the same purpose. Whatever would be a sufficient signature or a sufficient note or memorandum to satisfy the Statute of Frauds in the case of the agent of an individual, will be held a sufficient signature or a sufficient note or memorandum in the case of the agent or officer of a company. And wherever an agent acts in such a way as would bind his principal if that principal were an individual, he will equally bind his principal, that principal being a company.

The following cases will make this clear.

First, as to the authority necessary to constitute a person the company's agent for the purpose of making certain contracts,

The case of *Beer v. The London and Paris Hotel Company* may be referred to. There by the memorandum of association it appeared L. R. 20 Eq. 412. (1875)

that one of the objects of the company was to sell houses. An agreement to sell certain houses belonging to it was signed by the secretary (within sub-sect. 2). Held by the Court, that this was enough to satisfy the Statute of Frauds and bind the company.

Secondly, as to what constitutes a sufficient signature, see

L. R. 2 Q. B. D. 314. (1877) The case of *Jones and others v. The Victoria Graving Dock Co.* Here the defendants, by their secretary, entered into negotiations for the employment of the plaintiffs. A draft agreement being drawn up the defendants' secretary entered in the minute books of the company a resolution of the directors that the plaintiffs "having signified their willingness to undertake the management of the company's works upon the terms of the draft agreement submitted by them to the board, it was resolved that the said agreement be engrossed in duplicate, signed, sealed, and executed." The chairman at the next meeting of directors signed the minutes of the previous meeting pursuant to the Companies Act, 1862, s. 67. Held, that although the chairman signed only for the purpose of verifying the contents of the minute book, not to perfect the contract, the signature nevertheless operated as an admission of the contract contained in the draft agreement, and was sufficient to satisfy the 2nd sub-section of sect. 37 of the Companies Act, 1867.

W. N. 1877, p. 30. *Bourke v. The Alexandra Hotel Company* is a case on the third sub-section which deals with parol contracts. In this case the dispute was over some windows in a party wall which plaintiff alleged the defendant company had given him licence to make. The only evidence of such contract was that the surveyor of the plaintiff in his bill alleged that the defendants had consented, and that the defendants had acquiesced in the case of the two sets of windows for eighteen and ten years respectively. There was no resolution of the company giving consent. Held by the Court, that consent could be given without resolution: that a company under the Companies Act, 1862, would be bound by any Act which as between individuals would have bound them.

Contracts with Local Authorities.—A second statutory exception to the rule that corporations cannot contract except under seal, has been made as regards contracts entered into by local authorities acting under the powers conferred by the Public Health Act, 1875. They form an intermediate

class of cases. Up to a certain amount the corporate seal is not necessary to give validity to the contract, but where the amount of the contract exceeds 50*l.*, the seal is essential.

(See Bramwell, L. J., in *Hunt v. Wimbledon Local Board* ; L. R. 3 C. P. D. p. 52.
and Baggallay, L. J., in *Eaton v. Basker*.)

The following are the provisions of the Public Health Act, 1875, and of the Public Health (Ireland) Act, 1878, with respect to contracts.

“ With respect to contracts made by an urban authority under this Act, the following regulations shall be observed (namely):—

“(1.) Every contract made by an urban authority whereof the value or amount exceeds 50*l.* shall be in writing, and sealed with the common seal of such authority.

“(2.) Every such contract shall specify the work, materials, matters, or things to be furnished, had, or done, the price to be paid, and the time or times within which the contract is to be performed, and shall specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed.

“(3.) Before contracting for the execution of any works under the provisions of this Act, an urban authority shall obtain from their surveyor an estimate in writing, as well of the probable expense of executing the work in a substantial manner as of the annual expense of repairing the same ; also a report as to the most advantageous mode of contracting, that is to say, whether by contracting only for the execution of the work, or for executing and also maintaining the same in repair during a term of years or otherwise.

“(4.) Before any contract of the value or amount of 100*l.* or upwards is entered into by an urban authority ten days’ public notice at the least shall be given, expressing the nature and purpose thereof and inviting tenders for the execution of the same ; and such authority shall require and take sufficient security for the due performance of the same.

“(5.) Every contract entered into by an urban authority in conformity with the provisions of this section, and duly executed by the other parties thereto, shall be binding on the authority by whom the same is executed and their successors and on all other parties thereto and their executors administrators successors or assigns to all intents and purposes : Provided that an urban authority may compound with any contractor

38 & 39 Vict.
c. 55, s. 174,
and 41 & 42
Vict. c. 52,
s. 201.
Provisions as
to contracts
by urban
authority.

38 & 39 Vict.
c. 55, s. 174.

or other person in respect of any penalty incurred by reason of the non-performance of any contract entered into as aforesaid, whether such penalty is mentioned in any such contract, or in any bond or otherwise, for such sums of money or other recompense as to such authority may seem proper.”

Before discussing at some length sub-sect. (1), it may be desirable to mention a point or two with regard to the other and less important provisions of this section. In the first place, with regard to the directions contained in sub-sect. (3), it has been decided that these do not affect the contractor; the neglect of them will not invalidate his contract, though it may render doubtful the right of the urban authority to recover the costs from the ratepayers.

9 Ex. 457.

L. R. 8 App.
Cas. 517.

(*Nowell v. Mayor, &c. of Worcester*. And see *Younge v. Mayor, &c. of Royal Leamington Spa*.)

With regard to sub-sect. (4)

19 L. T. 408.
(1868)

Stiff v. The Eastbourne Local Board may be mentioned. There the urban authority, on accepting the security required by that provision, withheld from the surety's knowledge the fact that the works were to be executed to the satisfaction not only of their own but of another surveyor. Held, that the suppression discharged the surety.

Sub-sect. (1) is, however, the important part of the enactment, and on it it will be necessary to quote several cases at considerable length.

L. R. 3 C. P.
D. 208; 4
C. P. D. 48.
(1878)

The case of *Hunt v. The Wimbledon Local Board* deals with the case of an architect employed by a local board, and is important to all professional men similarly employed.

The plaintiff Hunt was an architect, and was engaged by the surveyor of the defendant board, acting under verbal instructions from the board, to prepare plans for new offices which the defendant board proposed to have erected. The plans were duly prepared, and tenders for the construction of the offices according to such plans were invited and sent in to the board. The amount required, however, to complete the offices exceeded the intentions of the defendant board, and the proposal fell through. The plaintiff then claimed his fees for the preparation of the plans, but though the jury found that the offices were necessary for the pur-

poses of the board, and that the plans were necessary for the erection of the offices, and that the cost of the plans was 94*l.*, it was held by the Court that sub-sect. (1) of the principal Act was mandatory and not merely directory, and that though the contract was executed by the plaintiff, still, as it was for more than 50*l.*, and was not under the seal of the defendant board, he could not recover upon it. (See, however, *Waghorne v. Wimbledon Local Board.*)

Times, 4th
June. (1877)
L. R. 8 App.
Cas. 517.
(1882)

A more recent case upon the same point is *Younge and Company v. Mayor, &c. of Royal Leamington Spa.* There the defendants—an urban authority under the Act—contracted with one Powis to construct waterworks. There was a condition in the contract that if Powis failed to execute the works, the defendants' engineer could employ persons to finish them, and charge Powis with the expense. Powis failed to execute the works, and the defendants' engineer employed the plaintiffs. As the works progressed, the engineer found that additional works were necessary before the original works could be finished, and with the defendants' approval he employed the plaintiffs to execute them too. The contract was not under seal. The plaintiffs executed the contract and the defendants had the benefit of it. *Held*, nevertheless, that the plaintiffs could not recover. The statute, it was decided, applied equally to executed and executory contracts; and the fact that the engineer who employed the plaintiffs was himself engaged under seal, was considered not to give him any right to bind his principals by a contract not under their seal.

The rule established in these two cases has been considerably modified by the decision in

Eaton v. Basker. In this case, the facts were as follows: A medical man agreed verbally with a committee of an urban sanitary authority to attend fever patients, accommodated in tents, at the rate of 5*s.* 3*d.* per tent per day. The attendance continued until the amount due was nearly 100*l.* It was held that the contract was not one the amount of which exceeded 50*l.*, because at the time it was entered into the parties had not ascertained that the amount would exceed 50*l.*; that the contract did not require to be under seal; and that the urban authority was liable to pay the fees of the plaintiff.

L. R. 7 Q. B.
D. 529; 44
L. T. 703.
(1880)

This case is of considerable importance to engineers and architects, who are often engaged by local authorities to advise on improvements at so much per day. Suppose,

for instance, a local board require a report on the best means of supplying water to their district. They ask an engineer for his terms. He replies, let it be said, five guineas per day. The board then agree to this rate of charge, and direct him to proceed. Now, if there be nothing to show at the outset that the engineer's account will necessarily exceed 50*l.*, and that the parties contemplated this result, the engineer can recover, on the authority of *Eaton v. Basker*, even though the account did in fact considerably exceed 50*l.*

It is to be observed that it is the contract itself which is to be under seal; in other words, the Act requires contracts for over 50*l.* to be by deed. It is not enough that the terms of the contract are set forth in a petition or other instrument which has the seal of the local board upon it, but which is not itself the contract, nor in any proper sense a deed. This appears from the recent case of—

60 L. J.
Ch. D. 172.
(1888)

The Tunbridge Wells Improvement Commissioners v. The Southborough Local Board. There the plaintiffs agreed to transfer certain land to the defendants on condition that defendants adopted a certain road, and dedicated it to the public. The agreement was not under seal, but the terms of it appeared in a petition which bore the common seals of both plaintiffs and defendants. The cost of completing the road was over 50*l.* *Inter alia*, Kay, J., held that the contract did not satisfy the requirements of the Public Health Act, s. 174, sub-s. 1. He said, in delivering judgment: "A contract under seal must be a deed. . . . Who ever heard that a petition which happens to be under seal is a deed? If an Act of Parliament requires that a contract shall be entered into under the seal of a public body, it requires that form of document in the shape of a contract which is a deliberate act, the solemnity of which shall be evidenced by its being under seal."

Contracts with School Boards.—A third statutory exception to the rule that corporations cannot contract except under seal, may just be mentioned. By the Elementary

Education Act of 1870, school boards are declared bodies corporate; by sect. 35 of that Act, they are given the power of appointing clerks, treasurers and other necessary officers; and by rule 7, Third Schedule of that Act, they may appoint any officer "by means of a minute of the board, countersigned by the chairman, and countersigned by the clerk (if any) of the board, and any appointment so made shall be as valid as if it were made under the seal of the board."

c. 75, s. 30,
sub-s. 1.

In *Scott v. The Great and Little Clifton School Board*, the question arose whether an architect employed to superintend the erection of a board school was a necessary officer under sect. 35, and consequently capable of being appointed by a minute of the board not under seal. Defendants' counsel argued that the section and schedule were intended to apply only to permanent officers of the board, and not to such as were retained merely to superintend temporary work, and he referred to the cases of *Clarke v. Guardians of Cuckfield Union*, and *Younge v. The Mayor, &c. of Royal Leamington Spa*. Mathew, J., who tried the case without a jury, held that the work done under the contract was incidental to the purposes of the corporation, and that it had been carried out with the knowledge of the defendants, and that the defendants had got the benefit of it; under these circumstances, he held that the plaintiff came within the thirty-fifth section of the Act and rule 7 of the schedule, and could be appointed by minute and without seal.

L. R. 14
Q. B. D. 500.
(1884)

Supra.

To return to the consideration of contracts with corporations in general.

Mutuality in Contracts by Corporations.—It is to be noticed that wherever the seal of a corporation or urban authority is necessary to make the contract binding as against the corporation or urban authority, it is also necessary to make it binding as against the contractor. This appears from the two following cases:—

The case of *The Mayor of Kidderminster v. Hardwick* was as follows:—The plaintiffs were a corporation and local board, they put up certain tolls for sale by auction. The defendant was

L. R. 9 Ex.
13. (1873)

the highest bidder, and was declared the purchaser. He paid a deposit, and signed an agreement to take a lease of the tolls. He failed, however, to obtain the sureties required by the conditions of sale, and applied to the plaintiffs to return the deposit which he had paid at the auction. The plaintiffs then held a meeting, and passed a resolution reciting the sale to the defendant, the terms, and the deposit he had made. The corporate seal was attached to the resolution. On action being brought by the plaintiffs against the defendant for breach of contract, it was held that the contract being one which, to be binding, had to be under seal, and the defendant having repudiated it before it was sealed, the plaintiffs could not recover upon it.

L. R. 14
Q. B. D. 911,
and 16 Q. B.
D. 446.
(1885)

In *Meliss and Pim v. Shirley Local Board* the circumstances were rather peculiar. The defendants employed the plaintiffs (one of whom was their own salaried surveyor) to prepare plans and specifications for certain works which it was proposed to carry out within the district. The agreement was not under seal. While the plans, &c., were in progress, but sufficient had been done to exceed 50*l.* in value, the plaintiffs applied to the defendants to affix the corporate seal to the contract, and this was done. The works, however, were not carried out, and the plaintiffs were not paid their fees. On action brought, Mr. Justice Cave held that the plaintiffs were entitled to recover. Here the ground of the decision was this:—Neither party to the agreement was bound by it until it was sealed. At the time it was sealed part of the work was not completed, and, as the plaintiffs could not be compelled to carry it out, their promise to do so was a sufficient consideration to support the sealing of the agreement. This case was subsequently reversed on another point.

Executed Contracts with Corporations.—Where, however, the contract is fully executed on the contractor's part, and the corporation or urban authority, taking advantage of the fact that the contract was not under seal, refuses to pay, it appears that the contractor has no remedy whatever. He cannot even set off a debt due from himself to the corporation or urban authority as against the money due by the corporation or urban authority to him. This was decided in

6 M. & W.
815. (1840)

Mayor, &c. of Ludlow v. Charlton. There the defendant was the tenant of the plaintiffs, and in arrear of rent to the extent of some

155*l*. He had contracted, not under seal, with the plaintiffs to alter for 500*l*. some buildings belonging to him, in the way desired by the plaintiffs. After the alterations had been made, the plaintiffs refused to pay, and the defendant attempted to set off the 155*l*. rent arrears against the sum due by the plaintiffs to him. Held, that he could not.

But if a municipal corporation or an urban authority choose to pay money due to a contractor under a contract, not binding on it because wanting a seal, the payment will be legal.

In *Reg. v. Mayor, &c. of Norwich*, the defendants made a contract within the Public Health Act, not under seal, for the construction of a street. The work being executed to their satisfaction, they resolved to pay the contractor. One Burgess, a town councillor, applied under 1 Vict. c. 74, s. 44, for a certiorari to prevent the defendants paying the money to the contractor, on the ground that it was a misapplication of the borough funds. Held, that it was not a misapplication, and that the defendants, though not legally bound to pay, could pay legally. 30 W. R. 752. (1882)

But though a corporation cannot, subject to the reservations already given, bind itself except by contracts under seal, it does not follow that every contract under seal binds it. That a sealed contract may bind it, the seal must be affixed by due authority, and the contract must not be *ultra vires*.

Contracts Ultra Vires.—First, with regard to contracts *ultra vires*, in the words of the Lord Chancellor, in

The Shrewsbury and Birmingham Railway Company v. The North Western Railway Company, “*Primâ facie* corporate bodies are bound by all contracts under their common seal. When the legislature constitutes a corporation, it gives to that body *primâ facie* an absolute right of contracting. But this *primâ facie* right does not exist in any case where the contract is one which, from the nature and object of incorporation, the corporate body is expressly or impliedly prohibited from making; such a contract is said to be *ultra vires*.” 6 H. L. Cases, 113. (1857)

Authority to seal.—With regard to proper authority for affixing the seal two cases may be referred to. The first of these is

L. R. 2 Ex.
158. (1867)

D'Arcy v. Tamar, &c. Railway Company. The directors of this company acted under the powers conferred by the Companies Clauses Consolidation Act, 1845, and the prescribed number of directors necessary to form a quorum was three. The secretary affixed the seal of the company to a bond by the written authority of two directors obtained at a private interview. At another private interview the secretary got a promise from a third director to sign the written authority. The company being sued upon the bond, it was held that the seal of the company was affixed without lawful authority, and that the company were therefore not liable upon the bond.

L. R. 3 Ch.
105. (1867)

In the case of *The Contract Corporation, ex parte*, a transfer of shares in a banking company was made to the Contract Corporation, and the seal of the latter company was affixed to the transfer without any resolution of the board of directors, but by the direction of the three persons who had the chief management of the affairs of the Contract Corporation. The banking company afterwards went into liquidation, and a question arose whether the Contract Corporation were shareholders in it. It was held that the Contract Corporation were shareholders, and that the seal had been affixed with due authority.

Precautions in dealing with Corporations.—As a rule, however, the employment of an engineer or architect is not of such a character as to fall within the exceptions to the general rule that corporate contracts must be under seal. The services of the professional man cannot be classed as necessities, or as being required to enable corporate bodies to discharge their functions and duties. Hence, most of the cases referred to, with the exception of *Eaton v. Basker*, are important rather to the contractor than to the engineer.

L. R. 7
Q. B. D. 529.

In passing away from the question of the retainer of the engineer or architect, it will be well to bear in mind the substance of the observation made by Martin, B., in the case of

15 Jur. 830.
(1851)

Williams v. The Chester and Holyhead Railway Company. "We cannot conclude without calling attention to the extreme imprudence of persons dealing with railway or other companies

upon letters or documents signed by the secretaries of such companies. There is no reason to suppose that any fraud was intended in this case, but the consequences to the plaintiff are the same as if the gross fraud had been practised upon him of the directors authorizing one contract, and their secretary knowingly communicating one varying from it to him. He not unnaturally supposed that the contract as contained in the letters of the 15th and the 19th October was the contract of the company; but in consequence of this contract not being authorized by the resolution of the 29th July, which he most probably never saw, it is not binding upon the company, and he has failed in his suit upon it.

“Persons dealing with those companies should always bear in mind that such companies are corporations, bodies essentially different from an ordinary partnership or firm, for all purposes of contracts, and especially in respect of evidence against them on legal trials, and should insist upon these contracts being by deed under the seal of the company, or signed by the directors in the manner prescribed by the Act of Parliament. There is no safety or security for any one dealing with such a body upon any other footing. The same observation also applies in respect of any variation or alteration in a contract which has been made.”

Remuneration.—Civil engineers and architects employed to design and superintend the execution of works and building, are generally paid by a commission of so much per cent. on the outlay. The rate per cent. varies according to the amount of the expenditure, but for works and buildings of moderate cost the commission is usually at the rate of five per cent. This rate has become so well recognized, that in cases where the fees payable to the professional man have not been definitely arranged, the latter can generally show, when the client disputes the amount, that five per cent. commission is a reasonable sum to charge, and that it is generally adopted in the profession. In matters, however, requiring more than ordinary skill, as in the case of the design of high-class fittings, and furniture for a mansion, the architect would be entitled to charge at a higher rate than five per cent. on the cost. For such special work the charge should be by time.

Quantity surveyors are also paid by a per-centage rate on the amount of the accepted tender, and this rate varies according to the magnitude of the work proposed.

There are, however, very many cases where engineers and architects are employed, and no works are carried out. For professional services in these cases, the remuneration is by the day. The rate of charge will, of course, vary according to the standing of the engineer or architect. A professional man may charge what he likes for his time, provided he gives his client express notice of his rate of charge. But where there is no agreement between the parties as to fees, the professional man will be held entitled to reasonable remuneration for the service rendered. What is reasonable will be a question for a jury or for the judge sitting alone, and the engineer or architect enforcing payment of his fees by action will be required to show that his charges are reasonable and proper, by putting forward members of his profession to say that his charges are fair and in accordance with the custom in the profession.

But it sometimes happens that a client admits that the rate charged per day is reasonable, but alleges that too much time has been spent on the work. This objection can only be met by having a carefully kept office diary by which it can be shown that all the time charged for has been spent *bonâ fide* on the work; and it may also be necessary to produce the evidence of experts to show that the time charged against the client is fair and reasonable, having regard to the extent and character of the work.

As already pointed out the rate of payment to engineers and architects per day will vary with the degree of eminence of the person employed; but a rate of 3*l.* 3*s.* per day may be regarded as about the lowest fee for a professional man of fair standing. This fee is generally allowed by the

masters in taxing party and party costs in cases where engineers or architects have been engaged as witnesses.

The Institution of Civil Engineers has never issued any rules or suggestions on the subject of fees. The members are left to their own views on the matter, and perhaps it is best so. It would be a matter of extreme difficulty to arrange a scale of professional charges that would be satisfactory to all the members, varying so much as they do in their degree of professional eminence.

Architects, however, have the benefit of a set of rules dealing with professional charges which has been issued by the Royal Institute of British Architects. But these rules have no binding effect in law, unless they are made part of the agreement between the architect and his client. At the same time they may, in case of disputes, be referred to as showing the rates of charges customary in the profession.

These rules are now quoted in full.

PROFESSIONAL PRACTICE AND CHARGES OF ARCHITECTS.

SCHEDULE SANCTIONED BY THE ROYAL INSTITUTE OF BRITISH ARCHITECTS, AND CONFIRMED AT A GENERAL CONFERENCE OF ARCHITECTS OF THE UNITED KINGDOM, 1872.

The usual remuneration is at 5 per cent. commission besides expenses, except for decorative work.	1. The usual remuneration for an architect's services, except as hereinafter mentioned, is a commission of 5 per cent. on the total cost of the works executed from his designs; besides which all travelling and other incidental expenses incurred by the architect are paid by the employer, who may be also charged for time occupied in travelling if the work be executed at a considerable or inconvenient distance, or if more than ordinary personal attendance is required. 2. But for all works in which the expenditure is mainly for skilled labour and not for materials, <i>e.g.</i> in designs for the fittings and furniture of
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		buildings, for their decoration with painting or mosaic, for their sculpture, for stained glass, and other like works, the architect's charge is not made by way of commission on the cost, but should be regulated by special circumstances and conditions.
Repetition in some cases justifies a lower rate,	3.	When several similar but distinct buildings are erected at the same time from a single specification and one set of drawings and under one contract, the commission of 5 per cent. should be charged on the cost of one such building, and a modified arrangement should be made in respect of the others.
and small outlay a higher rate of percentage.	4.	In works of small value, say £500 in amount, 5 per cent. is not remunerative, and the charge should be by time, or by an ascending scale reaching 10 per cent. for works under £100.
Commission is to be reckoned as if for new materials and a builder employed, chargeable on all executed, and $2\frac{1}{2}$ per cent. on all omitted work. An architect always entitled to payments on account.	5.	The commission is reckoned upon the total costs of the works, valued as if executed by a builder, and of new materials. $2\frac{1}{2}$ per cent. is charged upon any works originally included in the contract, but subsequently omitted in execution. This is exclusive of the charge for measuring extras and omissions.
	6.	The architect is entitled during the progress of the building to payment on account at the rate of 5 per cent. on the instalments paid to the builder, or otherwise to half the commission on the signing of the contract, or the commencement of the works, and the remainder by instalments as above.
	N.B.—The terms of payment adopted by her Majesty's Office of Works and Public Buildings may also be taken as an equitable method of payment on account, viz. :—	
	One-third part of the commission shall be paid to the architect immediately after the signing of the contract;	
	One-third part shall be paid to the architect as soon as one-half of the contract sum has been paid to the builder;	
	And the remaining one-third part shall be paid to the architect after the final payment to the builder.	

Charge for special services,	7.	The above charges do not cover professional services in connection with negotiations for site, in surveying it and taking levels, in making surveys and plans of buildings to be altered, in arrangements respecting party walls or right of lights, nor services incidental to arrangements consequent upon the failure of builders whilst carrying out work, or in cases of subsequent litigation; but all such services are charged for in addition.
and material alterations of plan by time.	8.	If the employer, after having agreed to a design, and had the contract drawings prepared, should have material alterations made, whether before or after the contract is prepared, an extra charge should be made, unless such alterations are rendered necessary by an unreasonable excess in the builder's tender beyond the architect's approximate estimate.
Charge for plans and specification only half the commission, adding one-half per cent. if tenders are obtained.	9.	If the architect should have drawn out the approved design complete, with plans, elevations, sections and specification, the charge is half the commission upon the estimated cost. If he should, in addition, have procured tenders in accordance with the instruction of his employer, the charge is one-half per cent. extra.
Alterations to premises may be charged at higher rate.	10.	For works in the alteration of premises, a special charge may be made on account of the special difficulties and trouble generally involved.
The commission covers sketches, plans, details, one set tracings, and duplicate specification, instructions, superintendence, examining accounts,	11.	The following are the professional services included in the ordinary charge of 5 per cent.:— The requisite preliminary sketches, drawings and specifications sufficient for an estimate and contract. Detailed drawings and instructions for execution. One set of tracings and duplicate specification. General superintendence of works (exclusive of clerk of the works). Examining and passing the accounts, exclusive of measuring and making out extras and omissions.

also approximate estimate,	12.	No additional remuneration is due for making an approximate estimate, such as may be obtained, for instance, by cubing out the contents. If a detailed estimate be required by the employer, an additional per-centage charge may be made.
The usual charge per day.	13.	The charge per day made by architects depends upon their professional position, the minimum charge being three guineas per day.
All payments to architect to be from employer.	14.	The above payments alluded to in this document are to be made by the employer to the architect, who is not to receive commission or payment of any kind from the builder, or any tradesman, in respect of works executed under the architect's direction.
Quantities.	15.	When an architect supplies builders with quantities, on which to form tenders for executing his designs, he should do so with the concurrence of his employer, and it is desirable, when practicable, that the architect should be paid by him rather than by the builder, the cost of such extra labour not being included in the commission of 5 per cent.
Ownership of drawings.	16.	In respect of the ownership of drawings and specifications, it has hitherto been the general custom for the architect to be paid for their use only, those documents remaining his property. N.B.—In case of sketches for works abandoned, this custom is recognized by Her Majesty's Office of Works and Public Buildings. No authoritative decision in the Courts of law has, however, as yet been given on the subject; it is therefore desirable, for the present at least, that the architect should have a distinct understanding with his employer on this point.
Estates.	17.	The charge for taking a plan of an estate, laying it out, and arranging for building upon it, should be regulated by the time, skill and trouble involved.
	18.	For actually letting the several plots (in ordinary cases) a sum not exceeding a whole year's ground rent may be charged.
	19.	For inspecting the buildings during their progress (so far as may be necessary to ensure the conditions being fulfilled) and finally certifying for

		lease, the charge should be a per-centage not exceeding one-half per cent. up to £5,000, and above that by special arrangement.
	20.	All the above fees to be exclusive of travelling expenses, and time occupied in travelling, as before mentioned.
	21.	The charge for the above does not include the commission for preparing specification, directing, superintending and certifying the proper formation of roads, fences and other works executed at the cost of the employer, nor for putting the plans on the leases.
Valuations.	22.	The following definite charges are recognized for valuation of property:— The charge throughout is 1 per cent. on the first £1,000, and half per cent. on the remainder up to £10,000. Below £1,000, and beyond £10,000, by special arrangement. These charges do not include travelling expenses, nor attendance before juries, arbitrators, &c.
Dilapidations.	23.	The charge for estimating dilapidations is 5 per cent. on the estimate, and in no case less than two guineas.

J. MACVICAR ANDERSON, *Hon. Sec.*
WILLIAM H. WHITE, *Secretary.*

ROYAL INSTITUTE OF BRITISH ARCHITECTS,
9, Conduit Street, Hanover Square, London, W.

RE-ISSUE: 31ST MARCH, 1882.

The case of *Kerr v. Sandys* may be of interest, as showing the views a learned judge and jury took of an architect's charges. The case was tried before Huddleston, B., and a special jury. The plaintiff was an architect, and claimed the sum of 1,541*l.* 10*s.*, less 200*l.* paid on account, for fees in respect of the preparation of plans and specification of a house proposed to be erected in the Lake District. The works had not been carried out, but rough quantities had been prepared by the plaintiff. There was some uncertainty

Building
News, 2 July,
1888.

as to the amount which the defendant wished to spend on the house. The plaintiff's estimate came to 28,000*l.*, but he pointed out in his report to the defendant that the outlay could be reduced by striking out a number of items. The work had been spread over a period of nearly three years. The defendant offered 2½ per cent. on an estimated expenditure of 20,000*l.*, which came to 500*l.* The plaintiff charged 2½ per cent. for the plans, also a lump sum for changes made in the plans at defendant's request, and a further sum in addition for the rough quantities, making in all 1,541*l.* 10*s.* The learned judge thought the 2½ per cent. should cover all changes in the plans. The defendant lodged 750*l.* in Court, over and above the 200*l.* paid on account. The jury found a verdict for the defendant proprietor.

Written Agreement.—Before passing from this part of the subject, it must be pointed out that when undertaking any professional employment engineers and architects should, if possible, have a written agreement with their clients, setting forth the duty undertaken, the amount of the fees, and the times of payment. Provision should also be made for possible disputes. When a formal agreement cannot be arranged—and many clients have a strong objection to signing agreements—the engineer or architect should, before beginning work, write a letter to the client reciting the terms and other details; and if the client allows the work to proceed without stipulating for any alteration in the terms thus stated, he will be bound by the letter, provided the contract does not come within the Statute of Frauds. (See p. 2, *supra*.) Where it does come within that statute, the architect should insist on a written acceptance of his proposal, as otherwise the client would not be bound.

In accepting a retainer from a corporation, the professional man should be satisfied that the work entrusted to him is not *ultra vires* of the corporation. He should also take care that the agreement is under seal, and, in the case of companies, that the directors or agents employing him have been duly authorized to that effect.

A short letter of terms and a form of agreement are now appended for the guidance of persons undertaking professional employment.

Form of Letter of Terms.

Dear Sir, PROPOSED VILLA AT MARGATE.

With reference to our interview of the inst., when you instructed me to act as architect in connection with the erection of your intended villa at Margate, I think it will prevent possible misunderstandings if I state shortly in writing the terms we verbally agreed upon.

I shall prepare the drawings and specification necessary to permit of a contract being entered into for the execution of the intended works, and alter and amend those documents, if so required, to meet your approval. I shall arrange for letting the contract, superintend the works during execution, and wind up the accounts.

My fees to be by commission at the rate of 5 per cent. on the total cost of the works in full for all services rendered by me, and paid as follows:— $2\frac{1}{2}$ per cent. on the signing of the contract, $1\frac{1}{2}$ per cent. when works two-thirds executed, and the balance, viz., $1\frac{1}{2}$ per cent., within two months after the date of my final certificate to the builder. See pp. 19, 21.

Further, you are to pay the wages of the clerk of works, should one be found necessary; and in case you do not proceed with the erection of the intended villa within six months after the drawings and specifications have been completed and finally amended as you may require, I am to receive for them $2\frac{1}{2}$ per cent. on the total estimated cost, and those documents are then to become your property. See pp. 24, 46.

In case of any dispute arising between us, the same to be determined by a person nominated by the President for the time being of the Royal Institute of British Architects, whose decision upon all matters, including costs, shall be binding upon both of us.

I am now about to begin the preparation of the drawings, which I hope to be able to submit in draft in about a week, and should I not hear from you to the contrary, I shall take it that you approve of the foregoing. See p. 26.

THOS. BROWN, Esq.
Sea View, Margate.

Yours, &c.,

Form of Agreement between a Civil Engineer and a Local Board.

See p. 5.

AN AGREEMENT entered into this day of 1889, between A. B., of No. , Victoria Street, in the city of Westminster, and county of Middlesex, Civil Engineer, of the first part and hereinafter called the Engineer, and the Local Board of Health, acting as the Urban Sanitary Authority, for the town and district of , in the county of Lancaster, and their successors in office, of the second part and hereinafter called the Local Board.

Whereas the said Local Board under and by virtue of the authority vested in them by the Public Health Act, 1875, being about to execute certain works for the extension and improvement of the sewerage of the said town of , have requested the said engineer to prepare the necessary drawings, specifications, and estimates for the said intended works, and to superintend the same during their execution, and the said engineer has consented to undertake and carry out the same :

See p. 3.

Now these presents witness, that in consideration of the payments to be made to him by the said Local Board as hereinafter provided, the said engineer agrees with the said Local Board as follows : that is to say,

That he, the said engineer, will take all levels, make all surveys, and prepare all drawings, specifications, and estimates of the said intended works, to such scales and with such particulars as may be necessary to enable the said Local Board to obtain the sanction of the Local Government Board to the same; and also to permit of the said Local Board entering into a contract or contracts for the due execution of the said intended works, and to alter and amend the said drawings, specifications, and estimates as may be required by the said Local Board or the said Local Government Board.

And he, the said engineer, further agrees to attend the meetings of the said Local Board from time to time to which he may be summoned in writing by the clerk, and to assist and advise the said Local Board in all matters relating to the design and execution of the said intended works, and also to attend and assist at any local inquiries with respect to the said intended works which may be held by order of the Local Government Board, and also to attend and give evidence at any arbitration held to determine the amount of compensation to be paid to all persons whose lands or premises may be taken or injuriously affected by the execution of the said intended works.

And the said engineer further agrees to aid and advise the said

Local Board in entering into a contract for the execution of the said intended works, and to superintend the same during their execution, by means of periodic inspections from time to time, as may be necessary, and to report on the progress thereof to the said Local Board, and to issue periodical certificates to enable the said Local Board to make payments from time to time to the contractor or contractors who may be entrusted with the execution of the said intended works, and to assist in winding up all accounts between such contractor or contractors and the said Local Board.

And the said engineer further agrees to exercise reasonable skill and diligence in the discharge of the foregoing duties so undertaken by him, and to act fairly as between the said contractor or contractors and the said Local Board.

And in consideration of the due discharge by him of the duties so undertaken, the said Local Board agree to pay to the said engineer a commission at the rate of 5 per cent. on the total cost of the said intended works, at the times and in the manner following, that is to say, one payment at the rate of $2\frac{1}{2}$ per cent. on the total cost, when the contract for the said intended works has been entered into, a second payment at the rate of $1\frac{1}{4}$ per cent. on the total cost when two-thirds in value of the said intended works have been executed, and a third and final payment of $1\frac{1}{4}$ per cent. on the total cost within three months after the date of the issue of the final certificate to the contractor or contractors for the said intended works by the said engineer; provided that in case the said Local Board should determine not to proceed with the said intended works, they shall pay to the said intended engineer, in consideration of the preparation by him of the said drawings, specifications, and estimates, the sum of 200*l.*, and the said documents shall thereupon become the property of the said Local Board.

And it is further agreed by and between the said parties, that should any dispute whatsoever arise between them, and payment of any sum of money be claimed by the one party from the other, and such payment be disputed, all such claims and counterclaims, if any, shall be referred to the determination of an arbitrator to be nominated by the President for the time being of the Institution of Civil Engineers, on the request of either of the parties, and the award of such arbitrator shall be conclusive evidence of the amount of money, if any, to be paid by the one party to the other in settlement of all claims and counterclaims, and neither of the said parties shall be entitled to commence or maintain any action at law or suit in equity for the recovery of any sum of money claimed from the other party until the amount of such claim shall have been referred

See sect. 1,
Arbitration
Act, 1889,
p. 206, *infra*.

and determined as hereinbefore determined, and then only for the amount so awarded; and the costs of the said reference and award shall be in the discretion of the said arbitrator, and the reference shall in other respects be subject to the rules and conditions usually inserted in orders of reference at nisi prius if the parties differ about the same; and this clause shall be deemed to be a submission to arbitration, and may, on the application of either of the parties, be made a rule of Court in any division of her Majesty's High Court of Justice.

In witness whereof the said A. B. hath hereunto affixed his hand and seal, and the said Local Board of _____ have hereunto affixed their corporate seal, the day and year first before written.

Signed, sealed, and delivered by the }
above-mentioned A. B., in the } A. B. (Seal.)
presence of .

Passed under the corporate seal of }
the said Local Board of _____, in } (Seal.)
the presence of .

Death of Engineer, &c.—The contract of employment between the engineer or architect and the client is, on the professional man's part, a personal one, and it is put an end to by his death. Hence, as a general rule, the engineer or architect's rights and obligations under the contract do not pass at death to his representatives. (*Hull v. Wright*.) Thus where the engineer or architect had contracted to perform certain work for a lump sum and died before completion, no right to recover the fee would pass to his representative.

E. B. E. 765.
(1859)

But the case is different where the work is to be paid for in instalments, because then a right of action to recover accrues as each instalment falls due, and this right will pass to the representative. This was the case in

L. R. 2 Ex.
311; 36 L. J.
Ex. 166.
(1867)

Stubbs v. The Holywell Railway Company. There the defendants retained Stubbs as engineer to complete certain works. The terms were that he was engaged for fifteen months' service, for which he was to be paid 500*l.* in quarterly instalments. He died at the end of nine months. Three instalments had thus accrued, only one

of which had actually been paid. His administrator brought an action to recover the other two. It was held that he was entitled to recover. Baron Martin, in delivering judgment, said: "Suppose a man enters into a contract to do a piece of work for a certain sum, then if he die before he completes it he can recover nothing, not even if before his death he has done nine-tenths of it. But suppose that the contract is for the performance of a certain piece of work for a certain sum to be paid at the rate, say of 50*l.* a month, then the person employed earns 50*l.* at the end of each succeeding month. It is true that if after doing a portion of the work he refused to do the rest, he might not be able to recover, because he could not prove that he was ready and willing to perform his part of the contract. But such a case as the present has no analogy with that of a refusal by the person employed to continue the performance. The contract no doubt is ended by the death of Stubbs, but only in the sense that the act of God has made further performance impossible. . . . No vested right of action is taken away by death. The contract is at an end, but it is not 'rescinded;' for rescission is the act of two parties, not of one."

Death of the Employer.—The considerations set forth in the judgment in *Stubbs v. The Holywell Railway Company* do not apply to the death of the employer before the work is completed. The contract on his side is not a personal one, and his decease does not prevent its being carried out. Accordingly his death does not put an end to it. The engineer or architect is entitled to complete the works, and to hold the estate of the employer liable for his commission. (*Cooper v. Jarman.*)

L. R. 3 Eq.
93. (1866)

Limitation of Liability.—It is generally worthy of consideration when an engineer or architect is entering into an agreement for professional employment, whether a limitation should not be attached to his possible liability under the contract. Thus, for instance, the engineer can only earn his five per cent. on the contract sum of, say, 5,000*l.*, or in all 250*l.* That is provided everything goes right and smoothly. But possibly something may go

wrong, and the employer, especially if the work is being done for a Board of Guardians, may be inclined to blame the engineer for his own and the contractors' short-comings. This may eventually result in a claim against the engineer of, say 1,000%. Then the position of the engineer is this: he may possibly earn 250%, and he may possibly lose 1,000% on the transaction. It would not appear unreasonable that the liability should not exceed the total amount of fees.

CHAPTER II.

DUTY UNDERTAKEN BY ENGINEER OR ARCHITECT.

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Representation.—A civil engineer or architect who holds himself out as ready to undertake professional employment, thereby represents to the public that he possesses the skill and competence required to enable him to discharge efficiently any duty or work which may be entrusted to him for execution. In fact, whenever he accepts a retainer, he impliedly warrants that his work will be carried out with reasonable skill and care.

Reasonable Skill.—What is reasonable skill, is a question that can only be determined on a consideration of the circumstances of each case as it arises. What under one state of facts would not be reasonable skill under another may be all the skill that the client is entitled to expect. Thus, if he employ a country surveyor to design and superintend the erection of an important bridge, and is quite well aware that the surveyor's experience and practice have only extended to the construction of simple road bridges and

culverts, and engages the surveyor because the fees will be lower in amount than would be the case were an engineer of experience to be retained, the client cannot blame the surveyor if matters turn out unsatisfactorily. A very high degree of skill and experience can only be obtained by the payment of higher fees. But the case would be different if the surveyor held himself out as having great experience and sufficient skill to enable him to carry out the important bridge just referred to. This would operate as a warranty that he was fully competent to perform successfully the duty undertaken, and if he failed from want of skill and knowledge, he would render himself liable to his client for this want of skill. The rule in ordinary cases is stated in,

8 East, 352.
(1807)

Scare v. Prentice, where Lord Ellenborough said that "an ordinary degree of skill was necessary for a surgeon who undertakes to perform surgical operations—which is proved by the case in *Wilson*, and, indeed, by all analogous authorities—in the same manner as it is necessary for every other man to have it in the course of his employment; as the farrier who undertakes to cure a horse must have common skill at least in his business, and that is implied in his undertaking."

2 Wilson, 359.
(1767)

Those observations apply with equal force to the case of the employment of an engineer or architect, and they will be found to be fully borne out by the following references.

5 C. B. N. S.
236; 28 L. J.
C. P. 85.
(1858)

Harmer v. Cornelius is a very important case, as it decides two points: (1) that a person who undertakes the duties of a skilled occupation must have reasonable skill; and (2) that when such a person is engaged for a definite period, his incompetence is a sufficient justification for his dismissal before the expiration of that period.

The facts of the case were as follows:—Plaintiff answered the defendant's advertisement for a scene painter, and was engaged by the defendant for a month certain, at a weekly salary. He was

found to be utterly incompetent, and was discharged at the end of the first week. In an action brought by him against the defendant for wrongful dismissal, the jury found incompetence, and the point was reserved whether this justified the defendant's behaviour. It was held that it did.

Mr. Justice Willes, in delivering judgment for the defendant, said: "When a skilled labourer, artizan, or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes—*Spondes peritiam artis*. Thus, if an apothecary, a watch maker, or an attorney, be employed for reward, they each impliedly undertake to possess and exercise reasonable skill in their several arts. The public profession of an art is a representation and undertaking to all the world that the professor possesses the requisite ability and skill. An express promise or express representation in the particular case is not necessary.

"It may be that if there is no general skill, and no particular representation of ability or skill, the workman undertakes no responsibility. If a gentleman, for example, should employ a man who is known to have never done anything but sweep a crossing, to clean or mend a watch, the employer probably would be held to have incurred all risks himself. . . .

"The next question is this:—Supposing that when the skill and competency of the party employed are tested by the employment, he is found to be utterly incompetent, is the employer bound nevertheless to go on employing him to the end of the term for which he is engaged, notwithstanding his incompetence? An engineer is retained by a railway company, for a year, to drive an express train, and is found to be utterly unskilful and incompetent to drive or regulate the locomotive—are the railway company still bound, under pain of an action, to entrust the lives of thousands to his dangerous and demonstrated incapacity?

"Misconduct in a servant is, according to every day's experience, a justification of a discharge. The failure to afford the requisite skill which had been expressly or impliedly promised, is a breach of legal duty, and therefore misconduct. The rule of the civil law, '*Imperitia adnumeratur*' applies."

And again, in *Duncan v. Blundell*: Here the defendant employed the plaintiff to erect a stove in his shop. The plan he adopted turned out a complete failure. An attempt was made at the trial to show that the plan was adopted on the express direction of the defendant, but this was not made out. Held that plaintiff could not recover. Bayley, J., in delivering judgment, said: Where a

3 Stark. 6;
5 M. & P.
548. (1820)

person is employed in a work of skill, the employer buys both his labour and his judgment; he ought not to undertake the work if it cannot succeed, and he should know whether it will or not; of course, it is otherwise if the party employing him choose to supersede the workman's judgment by using his own.

15 C. B. 188.
(1854)

And again see *Jenkins v. Betham*. This is an important case, as the point decided was as to the amount of legal knowledge which should be possessed by a person who undertakes to perform duties which, though not those of a lawyer, require some acquaintance with law. The defendants were valuers and surveyors, who undertook commissions to value dilapidations both between tenants and landlords and outgoing and incoming incumbents. They accepted a retainer from the plaintiff, on his appointment to a living, to value the dilapidations of his predecessor, and, through their ignorance of law, they valued them at much too low a figure. It appeared from their own admission that they were unaware of any difference of the law relating to outgoing and incoming incumbents and outgoing and incoming tenants of any other kind. The judge at the trial directed the jury that the defendants could not be held unskilful for not knowing the law as a lawyer should, but that they would be if they did not display such a knowledge of it as was ordinarily current. The jury found that the defendants did not act on, and did not know, the law on the point, but they displayed an ordinary knowledge of it. On motion for a new trial, the Court held that the verdict of the jury was against the weight of evidence. It ruled, that by holding themselves out as valuers of ecclesiastical property, though they did not thereby represent that they had a minute and accurate knowledge of the law on the subject, yet they might properly be required to know the general rules applicable to the valuation of ecclesiastical property, and the broad distinction which exists between the cases of an incoming and outgoing tenant and an incoming and outgoing incumbent.

Limited Experience.—As illustrating the rule that a client cannot expect a high degree of skill from a professional man having but a limited amount of experience, reference may be made to the case of

Belfast News-
letter, 2nd
April, 1879.

Henry v. Belfast Board of Guardians, tried at Nisi Prius. The plaintiff was a surveyor having experience mainly in the construction and maintenance of roads. In answer to an advertisement of the defendants, inviting competitive designs for a scheme of water supply, the plaintiff submitted plans and specifications, and an

approximate estimate of the cost of the works. These were accepted by the defendants, and the plaintiff was thereupon employed to carry the scheme into execution. The defendants were fully aware of the plaintiff's standing and experience. A considerable amount of work was done by the plaintiff in the way of surveys, levels, and preparing plans and specifications, and a provisional order was obtained. When the tenders for the works came in, it was found that the lowest one greatly exceeded in amount the plaintiff's approximate estimate. The scheme was then abandoned, and the plaintiff brought an action for his fees, which the defendants resisted, on the grounds that the plaintiff had failed to display due and reasonable skill, and that the defendants had derived no benefit from his services.

Dowse, B., told the jury that if they believed that the defendants employed the plaintiff, knowing that he was not the most skilful person they could procure, and kept him working for them, and derived benefit from his services, the plaintiff was entitled to be paid a reasonable remuneration for such services, and the jury found for the plaintiff in the sum of 300*l*.

Reasonable Care.—The client is entitled to expect from the engineer or architect whom he employs not only reasonable skill, but also reasonable care. What amounts to reasonable care will be considered when we come to treat of the liability of professional men. Meanwhile the case of

See Chapter IV.

Moneyppenny v. Hartland may be referred to. The plaintiff was a civil engineer, and was employed by a committee who were promoting the erection of a bridge and approaches. In drawing up the estimate for the work, the plaintiff relied on certain borings of the site, supplied by a person formerly in the employment of the committee. The estimate proved to be incorrect, and it was held that the plaintiff was bound to test the ground for himself.

2 C. & P. 378.
(1826)

Work doubtful.—In *Duncan v. Blundell*, Bayley, J., observed—

3 Stark. 6; 5
M. & P. 548.
(1820)

“That a professional man should not undertake work when he does not know whether he can succeed or not.”

And this is very good advice. Of course, some kinds of work are very doubtful in their results, and in such cases

the engineer and architect will be less tightly bound in their employment. Thus, an engineer may be retained to select a site for boring for water. The attempt may prove an utter failure, and no water found, but the inherent uncertainty of result in such a case would be a good answer to any charge of want of skill. At the same time, when an engineer or architect is entrusted with work which in its result is doubtful, he should protect himself against future reflections by making it clear to his client that the work proposed is experimental in its character, and that the experiment is at the risk of the client. Persons employing engineers and architects generally judge by results, and, as a rule, they fail to make due allowance for special circumstances and difficulties.

Engineers and architects should also be slow to adopt in their undertaking, or introduce into their plans without the express consent of the employer, new methods and new inventions, the efficiency of which has not yet been unquestionably established, as otherwise they may make themselves responsible for any break-down that may in consequence occur. In this connection, both the facts and the judgment in the old case of *Slater v. Baker and Stapleton* are still pertinent.

² Wilson, 359.
(1767)

There the defendants, who were surgeons, had been called in to attend the plaintiff, and they, without explaining to him their intentions, operated upon him with a newly invented instrument. Unfortunately, the result was disastrous, and the plaintiff in consequence brought an action against them. It was held, that the action lay. The Court, in delivering judgment, said: "For anything that appears to the Court, this was the first experiment made with this new instrument; and if it was, it was a rash action, and he who acts rashly acts ignorantly, and although the defendants in general may be as skilful in their respective professions as any two gentlemen in England, yet the Court cannot help saying that in this particular case they acted ignorantly and unskilfully, contrary to the known rule and usage of surgeons."

Preliminary Drawings.—It frequently happens that engineers and architects agree to supply preliminary drawings for the approval of the employer, and this is a course which should be adopted in all cases. Nothing is more annoying to a professional man, who has for his client a person who does not know exactly what he wants, than after the drawings are finished, to have them ruthlessly cut up by numerous alterations and excisions. It is far better to have full discussion over preliminary sketches, and only to proceed with the contract or working drawings when all the details of arrangement and design are settled and approved by the client.

But even where there is no express condition as to the client's right of approval, there will be such a right implied from the very nature of the employment. Of course this right of approval in the client must be exercised in a reasonable manner, and the professional man is entitled to have reasonable time and opportunity to amend his drawings so as to obtain approval of them.

In some cases preliminary designs are asked for from engineers and architects, to be prepared to the approval of the employer, and no definite arrangement made as to after proceedings. The question then arises, Are the drawings so submitted to be paid for? If the approval of the employer is a condition precedent to payment, this approval must be obtained before the claim for payment can be enforced.

Thus, in *Moffat v. Dickson*, the plaintiff was an architect, and was asked to prepare "probationary" drawings for an asylum, to the approval of a committee of the county lunatic asylum. The plaintiff supplied three sets of drawings on three separate occasions, but none of them were approved. The committee rejected them. Proceedings were then instituted by the plaintiff to recover the price of the drawings. The defendant committee denied liability, on the ground, *inter alia*, that a reasonable time had elapsed to enable the plaintiff to prepare the requisite drawings for the approval of the committee, and that the plaintiff had prepared divers drawings,

22 L. J. C. P.
265, 269, 272;
13 C. B. 543.
(1853)

which were not approved by the committee, but were rejected by them. The Court directed a verdict for the defendant committee, and the plaintiff architect had all his labour for nothing.

This case came again before the Court, for argument whether the defence relied on by the committee was a good answer in law to the plaintiff's declaration or statement of claim in modern phraseology.

Jervis, C. J., said, "I think the fair construction of the contract is this: I (the plaintiff) will take a sum of money for doing all the work, but I will run the chance of my plans being accepted, and if they are not approved of I am estopped, and I am not to be paid."

8 Court of
Sess. Cases
(4th series),
289. (1880)

Again, in *Landless v. Wilson*, a case arising in Scotland, the plaintiff, an architect, prepared detailed drawings for certain intended buildings, but the latter were not proceeded with. The defendant proprietor, however, used the drawings to his own profit in connection with a transfer of the site of the intended buildings to another party. In resisting the plaintiff's claim for payment for the drawings, the defendant alleged that the drawings were supplied in competition. The Court, however, took the view that the onus of proof lay on the defendant to show that the employment was gratuitous, and this he had not done.

When an employer instructs an engineer or architect to prepare drawings in the ordinary way, and does not make the carrying out of the works a condition precedent to payment, he will be liable to pay for the time and skill spent on the drawings, even though the latter are not carried into effect by the employer. The professional man can claim a reasonable remuneration for his work and labour.

Client's approval of Drawings.—A few observations may not be out of place on the question—What is the effect of the employer's approval of the drawings and specifications of works proposed to be carried out, quite independently of the matter of payment? In other words, Does the approval by the client of drawings and specifications estop him from afterwards alleging that the

engineer or architect has failed to exercise proper skill in the preparation of these documents? The answer to this is two-fold; and with respect to all those matters of policy upon which the employer is competent to form an opinion, the approval will be final to this extent, that the client cannot afterwards turn round on his professional adviser and charge him with want of skill. In all matters, however, of a technical nature, and with respect to which the employer cannot be supposed to be competent to form an opinion, the approval cannot be taken as binding the employer. The client can form an opinion as to the general policy and arrangement of the scheme of works proposed; but he is not competent, or at least he is not deemed to be competent, to determine the numberless matters of technical detail which are generally included in the drawings and specifications of proposed works or buildings. Thus the client can form an opinion as to what arrangement will suit him best in connection with his dining-room and kitchen, and how they should be situated with respect to each other. If the client determine on a particular arrangement after all the disadvantages have been pointed out to him by the architect, the client can only blame himself if the arrangement turn out unsatisfactory. It would be different, however, in a matter involving technical knowledge. Thus, if a railway engineer submitted plans of a proposed girder bridge to his directors, and the latter formally approved of them, this approval would not protect the engineer if one of the girders gave way under a passing train, and it appeared that the girder was of insufficient strength for the stress coming upon it. In this case the engineer would be the party in fault, and, on the facts stated, he would most likely be held to have failed in the exercise of reasonable skill in the design of the girder in question.

Care in preparing Documents.—When the drawings and specifications of intended works have been approved, they generally require the addition of a good deal of detailed information before being submitted to persons about to send in tenders for the works. Very scrupulous attention should be paid to the completion of the drawings. A few lines and figures on a plan, or a few words in a specification, may save a dispute about extras, involving a large amount to the client. If one-half the care was devoted to an examination of the documents before they are submitted to intending contractors that has to be expended upon them when a large bill for extras comes in, engineers and architects would save themselves and their clients a vast amount of trouble and expense.

Drawings, how prepared.—Under the term “drawings” are included the plans, sections, elevations, and details, by means of which the form, arrangement, dimensions, and mode of construction of an intended building or work are indicated or delineated. These are in nearly all cases prepared to scale, that is, the object or thing as laid down on paper bears a given proportion in its dimensions to the object as it is intended to be when actually constructed. The great desiderata in all drawings are, in the first place, to give an accurate idea to the client of the intended work or building; and in the second place, to afford the fullest possible information to persons who tender for the construction of the building or work. It is often made a term in contracts for the execution of works, that errors and discrepancies in the drawings are not to annul or vary the contract, and the engineer or architect, as the case may be, is to settle and determine all disputes arising from such matters. No doubt this is a very proper clause to insert in contracts, but the fewer errors and discrepancies there are

in the drawings to settle, the better for all parties concerned. Another provision usually adopted is, that certain portions of the works are to be executed in accordance with large scale detail drawings, to be hereafter furnished to the contractor. This is very good within moderate limits, but it would be very much better if the contractor had the details before him previous to his entering into the contract. When a detail drawing is furnished to the contractor for the first time, he may object to do the work included in it, on the ground that it is in excess of what he is bound to carry out under his contract, and he claims an extra payment accordingly from the proprietor. An element of dispute is thus introduced, which it would be much better if possible to avoid. The safe rule to be observed in the preparation of drawings for intended works, is to indicate everything, where this can be done. Nothing should be left to speculation, and to form material for future controversy.

Different practitioners adopt different methods of preparing their drawings. Amongst architects, there are the fine line method of the French school, and the scratchy style of the modern English school. Some architects, again, use colour in their drawings, and the different colours are taken as indicating various kinds of materials. But it must be borne in mind that in case of dispute and litigation involving the question, What a given tint on a drawing means? the architect will be in a difficulty unless he can show on his drawings or in the specification words defining the meaning of the different colours used in the drawings. It is submitted that the practice among architects as to colours is not sufficiently uniform to establish a custom with respect to the meanings to be implied from colours on drawings to the satisfaction of a Court of law. It would appear that in the case of

engineering and architectural drawings alike, the safest course is to write upon the drawings the names and descriptions of the materials to be employed in the intended structure or building. There can be no dispute if this method be adopted as to what is really intended, and it is just as easy for the draughtsman to write the words "wall in brick-work in cement," as to colour the wall red or blue on the drawing.

Copies of all contracts or working drawings are usually supplied to contractors, though in some cases they are allowed to make copies for their own use. In no case, however, should originals be allowed out of the engineer's or architect's office; and when the clients are a corporation, it is a good rule to lodge the originals with the clerk or secretary, copies, of course, being kept for the personal use of the engineer or architect. This practice prevents the suggestion that alterations have been made upon the drawings after the contract based upon them has been entered into. Members of public boards are sometimes likely to impute to professional men a course of conduct which they might possibly adopt themselves if placed in the same position; and the less opportunity afforded for such suggestion, the better for the peace of mind of the engineer or architect.

Warranty with Drawings.—The question may sometimes arise To what extent, if at all, is the employer responsible for the errors or insufficiency of the drawings of an intended work or building? The leading authority on this point is

L. R. 10 Ex.
112; 44 L. J.
Ex. 62; 31
L. T. 455.
(1875)

The case of *Thorn v. The Mayor of London, &c.*, an important one to engineers and architects engaged in designing and carrying out works. The facts were as follows:—The plaintiff entered into a contract with the city authorities for the construction of a bridge over the Thames, according to certain plans and specifications pre-

pared by the engineer of the Corporation. These plans included, *inter alia*, certain caissons, which were required to enable the foundations of the bridge piers to be constructed, and the specification provided that these caissons were to be made of the materials and in the form shown upon the drawings. The contract contained the usual clauses. After proceeding for some time with the caissons and spending a considerable sum of money, the contractor found that the proposed method of forming the caissons and the foundations was unworkable. Another plan was adopted by the contractor, with the consent of the engineer.

The plaintiff now sought to recover from the Corporation the expenditure he had incurred in attempting to carry out the plans of the Corporation engineer, which had proved unworkable. It was held, however, that the plaintiff could not succeed. That there was nothing by way of warranty on the part of the defendants that the plans of the intended works supplied were capable in all respects of being carried into execution.

It often arises in actual practice that after he has signed his contract the contractor finds that certain alterations are necessary in the plans to make the building safe. A wall is too thin: it must be made thicker, otherwise he will not be responsible for the results. If the contractor succeeds in frightening the architect or the employer into making a change, the way for an extra is thus opened, and the builder thus gets round *Thorn v. Mayor of London*.

It will perhaps be found an advisable precaution for engineer, architect, and employer to insert a non-warranty clause as to drawings in the specification of an intended work or building. Something to the following effect will, as a rule, meet the case:—

Non-warranty Clause.—"The said contractor further agrees to make no claim against the said proprietor for any payment whatsoever in excess of the contract sum of £ , in respect of any error, discrepancy, omission, or insufficiency in the said drawings, or on the ground that any portions of the works shown upon the said drawings are of unsuitable or of insufficient design, dimensions, or materials, and the said contractor agrees to supply and execute all additional materials and workmanship, if any, which may be required by

reason of such errors, discrepancies, omissions, or insufficiencies as aforesaid, and such additional materials and workmanship shall be deemed to be part of the works to be done under this contract, and to be covered by the contract sum."

The Property in Drawings.—In architectural practice a difficulty often occurs as to the ownership of the drawings. To whom do they belong? According to the opinion of many practitioners the client mostly purchases the use of the drawings to allow of the intended building being erected in accordance with them.

Rule 16 of the schedule issued by the Royal Institution of British Architects states that it has hitherto been the general custom for architects to be paid for the use only of the drawings, these documents remaining their property. It is recommended, however, that an express arrangement should be made between the architect and the client. It does, however, appear unreasonable that the client should pay for all the labour and time expended by the architect in preparing the drawings, and that he should not be entitled to claim them. The custom which is alleged to exist does not appear to be one that would commend itself to a Court of law.

The question whether, in the absence of express agreement, the architect or the client is entitled to the drawings, has not yet been made the subject of a definite decision. In fact, there is a comparative absence of authority, but the case of

Times,
17 Nov. 1870,
Court of
Exchequer.

Ebdy v. McGowan is of importance, as showing the opinion of the Court as to the right of the architect to claim the drawings after his services had been dispensed with.

The plaintiff was an architect, and was employed as such by the defendant to design a vicarage house and superintend its construction. The plans and specification of the house were duly prepared, and tenders sent in. During the progress of the work the defendant put an end to the plaintiff's employment, and asked that he should

send in his account. The defendant also required that the plans and specifications might be handed over to him. The plaintiff, however, refused to deliver the documents in question, and stated he intended to keep them. The agreement between the parties contained no provision as to the ownership of the plans and specifications. The only question in issue between the parties was with respect to the right to the documents; whether, in fact, in the event of the termination of the architect's employment, he was entitled to retain the documents.

In delivering judgment, the Lord Chief Baron observed "that if there was no such provision (to retain the plans and specifications) the plaintiff had no right to them. If there was a provision to this effect, then he would have such a right. The plaintiff gave evidence of a custom or usage amongst architects, that in the event of the employment of the architect being put a stop to, he was entitled to be paid for the plans, and also retain them. His Lordship was not prepared to express an opinion on the evidence as to the existence of such a custom, but then came the question, Was such a custom a reasonable one? He thought it was not. No such right as that set up by the plaintiff, viz., to retain the plans, existed, unless there was an express stipulation in the contract between the parties to that effect. It appeared contrary to reason, good sense, and justice, that in the event of the contract being put an end to, the architect should retain the plan for which he was entitled to be paid. It would require at least a clearly expressed stipulation in the contract to enable him to do so. The defendant was perfectly justified in refusing to pay until he had the plans. The execution of, and the plans themselves, formed the work and labour for which the plaintiff had charged the defendant."

Baron Bramwell endorsed the observations of the Lord Chief Baron, and remarked, that "the defendant had a right to the benefit of the plaintiff's work before he paid for it. But was there such a usage as had been set up by the plaintiff? In his Lordship's opinion such a usage was impossible. He could not help saying it was perfectly suicidal. So soon as it was brought into being, it cut its own throat with its own absurdity. He (his Lordship) was clearly of opinion there was no such usage, and the defendant was entitled to the plans."

Baron Pigott also concurred in the judgment of the Lord Chief Baron.

The question now suggests itself, Has the architect no remedy against the client who, having become possessed

of the plans and specifications for, say, a villa, uses those documents in the construction of a number of villas? Perhaps, indeed, the client hands the plans over to a friend about to build. Has the architect no copyright in his own design? The answer to this will depend upon the correct view as to the ownership of drawings. If the property in the drawings pass to the client, and it is submitted that this is the correct view, it would appear, as a natural consequence, that the client can make any use he likes of the drawings.

Specifications.—The specification of an intended work is the written description of such work, by means of which and the drawings the builder is able to form an estimate of the cost, and also to carry out the work to completion. *Specification*, under the Roman law, meant the application of labour to materials, but in connection with the science and practice of construction, the specification is the written description of the intended work or building. In general terms, the drawings indicate the dimensions and shape, while the specification describes the nature and quality of the material to be used in the intended work or building. It will, of course, be apparent that accuracy in the specification is essential, and a certain degree of fulness is also requisite. Where the description of a portion of work is very general and meagre, parties tendering will naturally interpret the description in a way very different to that the author of the specification intended. And this often happens after a tender has been accepted and a contract entered into. The contractor construes the specification in one way, and the engineer or architect in another, and the contractor's view as to what was intended is naturally enough what is most favourable to himself and entails least expense. These differences of opinion between engineers or architects and contractors occur very fre-

quently, and they generally give rise to claims for extra allowances over the contract amount. Hence it may be taken generally, that the more care devoted to the preparation of the specifications and drawings, the less likelihood there is of disputes arising during the progress of the works.

Specifications are usually divided into two portions. One part contains the general directions or conditions. These general clauses would, as a rule, apply to the case of any building or work. The second portion of the specification deals with the particulars specially applicable to the work about to be carried out. Thus, the provision that the contract amount will be paid by instalments, as the work progresses, is generally placed amongst the general conditions; whilst a direction that a girder is to be of cast iron, of a given quality and certain dimensions, and to be subjected to certain tests, is included amongst the particular conditions.

In the practice of most engineers and architects the specification is drawn up without any legal assistance, and when the tender for the work is accepted the solicitor is called upon to prepare a short agreement, and to this the specification is made a schedule. Very often, however, the general conditions included in the specification are contradictory, or in some way defective, and trouble and litigation may result. It would appear much the better course to have but one document—contract, agreement, and specification combined. This was the practice adopted by the Metropolitan Board of Works, and it is said to have worked very satisfactorily. Such a course has the further recommendation, that a party tendering knows the full contents of the agreement he will be required to enter into if his tender be accepted. Thus a frequent source of difficulty is got rid of. Again, if the matter comes before

See Appendix
II. (b.)

a Court of law there is only one document to be referred to and construed; and there is no opportunity for the Court to comment on the discrepancies between the contract, agreement, and the specification.

It is also a good practice to attach to the specification a list of the drawings referred to. These should be numbered in order, and a short description written opposite each number.

Copies of the drawings and specifications are generally supplied by the engineer or architect to the party selected as contractor for use on the works, and no charge should be made for these. To prevent possible complaint by the contractor the latter should be required to examine the copies with the original documents and satisfy himself that they are accurate.

Tenders.—A tender, as understood in connection with engineering and architectural practice, is a proposal or offer to execute works intended to be carried out for the person asking for such tender. A tender, unless the works will necessarily occupy more than one year in execution, may be by parol; but as a matter of fact writing is nearly always adopted. Confusion and difficulty arise soon enough in connection with building contracts without laying the foundation for them at the outset. Tenders are usually invited on the terms that the work tendered for is to be done in accordance with the terms and conditions set forth in the drawings and specification. It is also a usual condition in the advertisement calling for tenders that the promoters or employers do not bind themselves to accept the lowest or any tender.

The question will at once occur, Is a tender for works duly delivered to the employer and accepted binding upon him and the person making such tender? Firstly, then,

there must be an acceptance, because to form a valid contract there are required a proposal and acceptance with respect to the same subject-matter on the same terms. Then there is the consideration required, which is the price stated in the tender.

But an acceptance will not, in every case, bind the proposer and acceptor of the tender. That this is so in the case of certain corporations will appear evident, when it is remembered that in certain cases, referred to in a previous Chapter, corporations can only be bound under seal. In the case of local authorities, this is expressed in sect. 174 of the Public Health Act, 1875. Hence, in such instances, until the seal of the authority has been duly affixed, either to the tender, with a formal acceptance indorsed upon it, or to a document reciting the tender and containing an acceptance of it, either party can recede from the proposal contained in the tender.

38 & 39 Vict.
c. 55, s. 174.

As a rule, however, where a seal is not required, a simple acceptance of the tender, indorsed upon it and signed by the acceptor, or contained in a separate document, will bind the parties.

In many cases, however, it is usual to insert in specifications, in the clause relating to tenders, that a formal agreement will be required to be entered into by the parties, and the question may arise—Is the contract an open one until this agreement is executed, or does the mere acceptance close the bargain? The answer depends upon the intention of the parties, as set forth in the proposal and acceptance. In the words of Sir George Jessel, M. R., in

Winn v. Bull, “Where you have a proposal or agreement made in writing, expressed to be subject to a formal contract being prepared, it means what it says: it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract, it becomes a question of

7 Ch. D. 29.
(1877)

construction whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement, the terms of which are not expressed in detail."

24 L. J. Ex.
23. (1854)

Thus, in *Kingston-upon-Hull Guardians v. Petch*, the plaintiffs advertised for tenders for supplies for their workhouse. The advertisement announced that those whose tenders were accepted would be required to enter into a formal written contract. The defendant tendered and was accepted, but before any formal contract was executed, withdrew his tender. Held, that he was entitled to do so, as until the formal contract was executed there was no binding agreement.

L. R. 3
Q. B. D. 667.
(1877)

Again, in *Lewis v. Brass*, the plaintiff advertised for tenders for certain works, and the defendant, a builder, sent in a tender which was accepted. The advertisement made no stipulation as to executing a formal contract, but the acceptance contained a statement that a formal contract would afterwards be prepared. The defendant, finding that he had made a mistake in his calculations, withdrew his offer. The plaintiff employed other builders, who completed the work, but the expense much exceeded the amount of the defendant's tender. On action brought, held that the contract was complete and binding on both parties on the plaintiff's acceptance of defendant's tender, and that defendant was liable for the difference between the actual cost of the building and the amount of his tender.

Manchester
Assizes,
Building
News, 24th
April, 1885.

Again, in *Halliwell v. Travis*, which was tried before A. L. Smith, J., with a jury, the plaintiff had invited tenders for the repair of his mill at Littleborough. Defendant's tender was the lowest. It was accepted, but the defendant then declined to proceed with the work. The plaintiff took the next highest tender, and the work was proceeded with. The plaintiff now sought to recover the difference between the actual cost of the repair and the amount of defendant's tender. The result was a verdict for the plaintiff mill owner for the sum of 45*l*.

Bills of Quantities.—The final set of documents required to complete the preliminaries to a building contract are the bills of quantities. It is not essential to have these, because a contractor may prepare his tender from an examination of the plans and specifications. Large firms, however, will not, as a rule, tender for works if they have to prepare the quantities for themselves. The

demand upon their own time, and the time of their staff, thus created, would be more than could be spared.

When the bills of quantities relating to an intended work or building are sent to a contractor, he goes through the items in order, affixing his price to each. The result of so many yards, at so much per yard, as the case may be, is then carried out into the money column. The sum of the amounts in the column is then made up. The labour of the party tendering is thus confined to fixing the several prices, and working out the total. The result is, that the competition for the intended work is much more general than it could possibly be if quantities were not supplied in the manner stated.

Bills of quantities vary greatly in the amount of detail which they contain. Thus, there are rough quantities, which are prepared for the purpose of getting out a preliminary estimate; and then there are the ordinary bills, which are supplied to parties about to tender for an intended work or building.

A good definition of a bill of quantities will be found on referring to the pleadings in

Scriviner v. Pask, where it is described as follows:—"A bill of quantities for work to be done in erecting a building professes to be a correct list of the quantities of work and materials required to be done and provided in the erection thereof." L. R. 1 C. P. 715. (1866)

Though the practice with regard to bills of quantities is now pretty well settled, it is necessary to refer to the different modes of procedure which are occasionally adopted.

Firstly, then, though strictly speaking it is not one of his duties, the architect may himself prepare the quantities and supply them to parties tendering. He may do this independently of or by agreement with the employer. If he does it independently of the employer, of course his act

cannot prejudice the latter; in preparing the quantities he acted for the builder's convenience or for his own, and the employer cannot be held responsible in any way for their accuracy. But if he does it by agreement with the employer, he is the agent of the latter in preparing them, and under certain circumstances the latter may be held liable for any inaccuracies that they may contain. To make the employer liable to the contractor for inaccuracies two things must be shown. It must, in the first place, be shown that the bills of quantities were so culpably inaccurate as to amount to a fraudulent misrepresentation on the part of the architect preparing them; and in the second place, it must be shown that the employer was himself aware of that, or that the false representation was made in his interest, and that he received the benefit of it. *British Bank.*

L. R. 18 Q. B.
D. 714. (1887)

Co. v. Charnwood, &c. Co. What amounts to a fraudulent misrepresentation is thus explained by Lord Herschell in

L. R. 14 Ap.
Cas. p. 374.
(1889)

Peek v. Derry. "Fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. . . . To prevent a false statement being fraudulent there must, I think, always be an honest belief in its truth."

The following cases will show the limits of the responsibility of the employer for inaccuracies in bills of quantities prepared by the architect.

L. R. 1 C. P.
715. (1866)

The case of *Scriviner and another v. Pask* is in point, and the facts were as follows: The defendant Pask employed Paice, an architect, to prepare plans, specifications, and obtain tenders for the erection of an intended house. The architect took out the quantities, and the plaintiff, a builder, tendered on those quantities. This tender was in due course accepted, and the plaintiff paid the architect for the quantities. The quantities, however, proved deficient, and the plaintiff sued the proprietor for the amount of this deficiency.

Blackburn, J., observed, "To succeed the plaintiffs must show three things: that Paice (the architect) was the defendant's (proprietor's) agent; that Paice was guilty of fraud or misrepresentation; and that the defendant knew of it and sanctioned it. There

is no evidence here of either of these things. If there has been misconduct on the part of Paice (the architect) the plaintiffs have their remedy against him."

Also in the case of *Sharpe v. The San Paulo Railway Company*, L. R. 8 Ch. which was decided in the Court of Appeal. The plaintiff contractor claimed against the company in respect of loss due to error in the statement of the works to be done, supplied them by the company's engineer. It appeared that the engineer had prepared a specification of the works required in the construction of the proposed railway. The plaintiff attached prices to the several items of work and materials, and agreed to construct the railway for the sum total of the prices affixed to the items. The works were completed, and the engineer had given his final certificate. The plaintiff made a number of claims in excess of the balance certified by the engineer to be due by the company. One claim was in respect of deficiencies in the quantities supplied by the engineer. It was held, however, by the Court (James and Mellish, L.JJ.), that although the amount of the works to be executed might have been under-stated in the engineer's specification, the contractor could not, in the absence of fraud, maintain any claim against the company on that ground. Ap. 597.
(1873)

Another mode of proceeding sometimes adopted, is for the engineer or architect to supply forms of tender to parties likely to tender for an intended work or building. In this form there is included a tabulated list or schedule of all the leading items of work and materials, compiled from the plans and specification. The quantities are not given, but parties tendering are requested to fill in the quantities and prices as making up the total amount of their tender. This system has the advantage that the responsibility for errors in the quantities lies upon the contractor; but there is the very serious objection, as already pointed out, that the competition for the work will very likely be limited.

Again, in some cases the quantities, whether prepared by the engineer or architect, or by a quantity surveyor retained by the employer, are made the basis of the contract. The contractor is then only bound to execute

the work and materials detailed in the bill of quantities. This method of procedure has many advocates, both amongst professional men and contractors. It renders the contractor safe against loss due to errors in the quantities. Let them be right or let them be wrong, he is only bound by the quantities. But employers, it is submitted, look at the matter differently. There is always the possibility that the contractor will claim for extra works, even though no departures have been made from the plans and specification. An employer cannot understand why he should pay for extras when neither he nor his architect has required any to be executed. It may, of course, be said, in answer to this objection, that the employer has his remedy against the quantity surveyor for errors in the quantities; but even admitting this for the moment to be true, it appears to be an unsatisfactory answer to the employer to be told that after engaging in an unsuccessful lawsuit or arbitration with his contractor, he may possibly succeed in recouping himself by entering upon another lawsuit or arbitration with his quantity surveyor.

But by far the most usual method of dealing with the preparation of quantities, is that according to which the engineer or architect places the plans and specifications of an intended work or building in the hands of a quantity surveyor. The bills of quantities are then supplied by the surveyor to all parties desirous of tendering. The fees to be paid to the surveyor, which are in most cases calculated as a percentage on the total cost of the work, are included in the tender. The successful party, whose tender is accepted, is then liable to the surveyor, and the fees are generally paid when the contractor receives his first instalment on foot of his contract. The employer pays the fees eventually, because they are included in the tender.

Most surveyors, when sending out bills of quantities to builders, forward at the same time a note of the terms and conditions as to fees and time of payment. A builder who accepts the bills of quantities with these conditions before him, and makes use of them, will be bound by the terms so stated.

In *Taylor v. Hall* the facts were as follows:—The plaintiff, a quantity surveyor, acting on instructions from the architect of the owner of a house, prepared bills of quantities for certain intended alterations to such house. A number of builders, including the defendant Hall, sent in tenders for the work. None of the tenders were accepted, and Hall afterwards sent in a fresh tender, based on certain modifications in the plans and quantities. The proprietor then made an agreement with Hall that the latter should carry out the works in a manner different to what had been indicated on the plans, and the proprietor agreed that Hall should not be liable for Taylor's charges. Taylor then sued the builder, Hall, for his fees for preparing the quantities; but he did not succeed. Monahan, C. J., observing "That the builder who carried out the new plan, though he might have tendered under the old plan, was not liable if he did not use the surveyor's calculations." The uncontradicted evidence of the defendant's foreman being that the plaintiff's calculations were not used.

L. R. Ir. 4
C. L. 467.
(1869-70)

When the intended work for which bills of quantities have been prepared is proceeded with, the general result is, that the surveyor gets his fees in due course; and if there are any extra works claimed for by the builder, the surveyor is generally called in to measure them up, and in very many cases, his valuation of the extra works is accepted by both architect and builder.

But a difficulty frequently arises where the erection of the intended building or work is abandoned after the tenders are sent in. The lowest tender often proves to be far in excess of the engineer's or architect's preliminary estimate. The employer then takes fright at the large amount of money he will be required to provide, and abandons altogether his intention to build. Now, when this state

of things arises, the question will occur, Who is to pay the quantity surveyor? If he has been employed by the architect under an express authority from the employer, the latter will, of course, be responsible for the surveyor's fees. As a general rule, however, the architect has not an express authority to call in the services of a quantity surveyor. The answer, then, depends on the extent of the architect's implied authority—a point that will be considered in the next chapter.

CHAPTER III.

AUTHORITY OF ENGINEER OR ARCHITECT.

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Engineer, &c., a skilled Servant.—In preparing drawings for intended works, and in all those other matters of professional employment which do not involve any relations with third persons, the engineer or architect is in the position of a skilled servant. But when works are being carried out by a contractor under the supervision of the professional man, or when negotiations are being conducted on behalf of the client, the engineer or architect is in the position of an agent for his employer. Thus, if the owner of an estate retain a surveyor to make a plan of the estate, the matter is one of work and labour, though involving special skill. But if the owner retain the surveyor to superintend the construction by a contractor of a road through the estate, the case is one of agency.

As a general Agent.—In these instances, then, the professional man is the general agent of the employer. As such he has authority, independent of any special agreement, to bind the employer by his acts and orders, so far as those

L. R. 13 Eq.
1; 41 L. J.
Ch. 38. (1872)

acts and orders are within the general scope of his employment. This seems to be established by the case of *Kimberley v. Dick*, which is also important as bearing on another point. The facts in this case were peculiar.

The defendant Dick retained White, an architect, to design and have erected for him certain additions to his mansion-house, one of the conditions of the retainer being that these additions were not to cost over 15,000*l*. White, without communicating this condition to him, obtained a tender from the plaintiff, Kimberley, for a sum slightly under this amount. By the contract White was to have power to order additions and variations in the undertaking, and was to have power to decide what were additions and variations, and what payment the plaintiff should receive for them. White ordered various additions and variations, and it was held, *inter alia*, that White was the general agent for Dick in matters connected with the erection of the house, and that therefore the plaintiff was not bound by the undisclosed condition between White and Dick, that the cost should not exceed 15,000*l*.

This authority to bind the employer by all acts and orders so far as they are within the general scope of his employment, arises, as has been said, independently of any special agreement between the employer and the architect or engineer; it belongs to the architect or engineer *quà* architect or engineer. It can, however, be extended or diminished by special agreement; but there is this difference between its extension and its diminution: while it can be extended by an agreement between employer and professional man, not disclosed to the contractor, it can only be diminished by an agreement disclosed to the contractor. Where he has not received express notice to the contrary the contractor is entitled to assume that the architect or engineer has the full authority which belongs to his office, that is, the authority to bind his employer by all acts and orders within the scope of his employment. For instance, in the case of *Kimberley v. Dick* the plaintiff was entitled to assume that the architect had power to pledge his

employer's credit to whatever sum was necessary to carry out additions and variations properly ordered by him. If, however, before he contracted to build the house he had been informed of the agreement between the employer and the architect that the whole cost was not to exceed 15,000*l.*, he would have been bound by it, and could not have recovered more from the employer than 15,000*l.*

When the authority of the engineer or architect is extended or diminished by express agreement, duly set forth in the building contract or otherwise, the extent of it will of course depend on the words in which it is set forth. The question, then, is one of mere construction of documents. When no express authority, however, is given, the architect or engineer has power, as has been said, to bind the employer by all acts and orders within the general scope of his employment. It becomes important, then, to ascertain what acts and orders will be considered to be within the general scope of the architect's or engineer's employment. It is hard to lay down authoritatively a general rule, but from the cases it would seem that the Courts are not inclined to consider any acts or orders to be within the general scope of the engineer's or architect's employment, except such as are absolutely necessary for carrying out the work which he has been retained to supervise. Their view of the functions of the professional man seems still well expressed in the words of Alexander, C. B., in

Rex v. Peto: "A person who ought to be in general but an overlooker of the owner, to see that the work is accurately performed." 1 Y. & J. 37. (1826)

How narrow are the limits within which it is prudent for the professional man to attempt to bind his employer by acts or orders to which he has not previously obtained his consent, the following remarks and cases will show.

Ordering Additions and Deviations.—First, with regard to deviations from the drawings and the ordering of new work. It seems perfectly certain that without the express consent of the employer the architect or engineer has no authority whatever materially to alter the contract and work as laid down in the drawings and specifications. *Cooper v. Langdon* is conclusive upon this point.

9 M. & W.
60. (1841)

There, according to the drawings and specification, a certain wall was to be of brick. By direction of the architect a wall of stone was substituted by the builder. The employer brought an action against the builder for breach of contract in not carrying out his agreement to erect the works according to the drawings and specification. He was held entitled to recover. "The defendant," Alderson, B., said, "undertook to do the works according to the drawings. He has not done so; but says he deviated from them by the authority of the architect of the plaintiff. He does not aver that he did them according to the plans and specifications; and no authority is shown on the part of the architect to bind the plaintiff by any deviation from the drawings."

And even where the building contract confers certain powers on the architect to vary the work as set forth in the drawings, those powers must be strictly observed. This would appear from the case of *Rex v. Peto*.

See *supra*.

Peto there contracted to build a custom-house according to given plans and specifications. By a condition in the contract Peto was to make such "additions or omissions" as the surveyor directed. By the plans the foundations of the custom-house were to be piled. Owing to some real or supposed difference in the bottom from that which it was supposed to be, the surveyor directed Peto to build the custom-house without piling the foundations. Held, that this was a deviation—not an addition or omission—and that the power to order "additions and omissions" did not give authority to the surveyor to order variations. Hullock, B., referring to the plea that the deviations were ordered by the employer's surveyor, said:—"Unless there is authority to be found on the bond and specification the surveyor might as well have been any third person."

Retaining Quantity Surveyor.—Another point to be noticed is with regard to retaining a quantity surveyor.

Whether the engineer or architect is entitled to retain a quantity surveyor without express authority is, to say the least, extremely doubtful. The cases decided on this point have been usually *nisi prius* cases, and, as a rule, they have not been reported in the ordinary reports. The consequence is, that it is often very difficult to say exactly what the ground was on which the decisions went.

A great deal appears to depend on the exact commission of the architect or engineer. For instance, when his commission is to draw plans and obtain tenders for the works, it would seem to be certain that this gives him an implied authority to retain a surveyor to take out quantities; the Courts considering that, as supplying the quantities facilitates the obtaining of tenders, therefore a contract to obtain them falls within the scope of the professional man's employment in this case.

An illustration of this is the case of *Waghorne v. Wimbledon Local Board*.

In *Waghorne v. Wimbledon Local Board*, which has been referred to in another place—being one of those cases where the fact that the seal of the corporation had not been attached to the contract, did not invalidate the latter—the defendant board, by resolution, instructed their surveyor to prepare plans and specifications and procure tenders for the erection of a mortuary chapel. The surveyor instructed the plaintiff to take out the quantities, which were sent out in the usual way, and a number of tenders based on these quantities were sent into the board. The amount of the tenders was in excess of the board's intended expenditure, and none of them were accepted. On the plaintiff Waghorne's bill being sent in the board refused to pay, and the action was then brought. Times L. R. (Q. B.) 4 June, 1877.

The judge held, that as the board had instructed their surveyor to procure tenders, and as tenders could not have been made without quantities, the board had impliedly authorized him to get the quantities taken out. On the objection that there was no contract under seal, the judge held, that as the board had by resolution impliedly authorized their surveyor to get the quantities taken out,

and had the benefit of the work which had been done, their objection was not tenable. Judgment for the plaintiff for amount claimed.

When, however, the commissions of the architect or engineer does not include the duty of procuring tenders for the works, it is very doubtful whether the retaining a quantity surveyor is within the scope of his employment. The decisions upon the point can scarcely be considered consistent, but, as far as any rule can be evolved from them, they appear to have established this, that the Courts will not consider the employment of a quantity surveyor to come within the implied authority of the architect or engineer, except where a special custom of the profession to that effect can be proved to exist.

3 Bing. N. C.
814. (1837)

Moon v. Guardians of Witney Union, where the architect of the guardians prepared plans and specifications of certain intended buildings, and instructed the plaintiff Moon to take out the quantities. The plans and specification were deposited with the clerk of the guardians, and a memorandum of instructions to builders accompanied them to this effect:—"Builders tendering for the intended workhouse are informed that quantities are now being prepared and will be ready for their use on a given date. The successful party will have to defray the cost of the quantities, the charge for which will be stated at the foot of the bill of quantities when delivered." Owing to a dispute between the guardians and their architect the works were not proceeded with, and the latter furnished his account to the guardians, and at the same time sent in Moon's account for the quantities. The guardians paid their architect's account, but repudiated all liability with respect to the cost of the bills of quantities. They had never heard of Moon till his account was furnished. When the case came to trial, Moon proved that it was customary for architects to employ surveyors, and that the successful builder added the surveyor's fees to the amount of his tender.

The jury returned a verdict for the plaintiff Moon. On the argument for a new trial it was held that the defendant guardians were liable to pay for the quantities. Tindal, C. J., observing, "The jury found that there was a usage in the trade for architects or builders to have their quantities made out by surveyors. The defendants had notice that such was the practice. The successful competitor was to defray the expense of taking out the quantities.

If this was to be so, what was to be the result if, by the defendants' fault, there was no successful competitor, because there was no competitor at all? In such a case the defendants must be liable for the amount of a charge which they have authorized."

Again, *Evans v. Carte* is a case of some importance, though it leaves the question in a rather doubtful position. The plaintiff, a quantity surveyor, was employed by the defendant's architect to prepare reduced bills of quantities for the use of builders about to tender for the erection of a theatre. Some time previously the plaintiff had supplied bills of quantities for the theatre; but the tenders were too high, and the defendant did not proceed with the building, but told the architect the expenditure would have to be brought down. These first bills of quantities were paid for by the defendant. The architect's services were then dispensed with, and the plaintiff sought to recover fees for his services in preparing the second or reduced set of quantities. On the case coming to trial, the question left to the jury was whether the architect had actual authority to get the estimates reduced. The jury found that there was such authority, and a verdict was entered for the plaintiff. On the case coming before the Divisional Court (Coleridge, C. J., Manisty and Bowen, JJ.) on motion to set the verdict aside as being against the evidence, Coleridge, C. J., said, Times, 28
May, 1882.

"It was monstrous that, apart from actual contract, the employer should pay for the quantities. In actions tried before him it had never been suggested that, apart from custom or contract, the employer should pay for them. In the present case, however, the claim having been put upon the ground of actual authority, the general question of law does not arise, and it becomes a question of the alleged authority. So far as he was concerned he would have given a different verdict. He did not think the defendant had given authority for the preparation of the reduced quantities; but as the verdict was one at which the jury might have not unreasonably arrived, he thought it best not to disturb it." Manisty, J., concurred with the Chief Justice, and thought "the verdict should stand unless it was shown to be wrong, and he was not satisfied that this was the case." Bowen, J., who had tried the case, also concurred, and said that "it was not a sufficient ground for setting aside a verdict, that perhaps the judge, had he tried it without a jury, might have come to a different conclusion."

That retaining a quantity surveyor does not, generally speaking, come within the authority of the architect as the general agent of the employer, seems to be established

conversely by the following case; for if it did come within his authority as general agent, of course a limitation put by the employer on that agency, and not communicated to the surveyor, could not affect the relations between the surveyor and the employer.

Times, 29
June, 1867.

The case of *Richardson and Waghorne v. Beales and others* differs from the preceding cases, because the action was brought against the proprietors when it should have been brought against the architect.

The defendants were the committee of a new club, and invited designs in competition for the erection of an intended club house. The plans of one Porter, an architect, were accepted, and the plaintiffs prepared bills of quantities on instructions from Porter. The tenders sent in were, however, too large in amount, and the proposal to build was abandoned. The plaintiffs then sued the committee for their fees in respect of the bills of quantities.

It turned out in evidence, however, that when accepting Porter's designs the defendants had instructed him to obtain tenders provided he did not pledge the liability of the committee. The presiding judge expressed a strong opinion that the plaintiffs on this state of facts were out of Court, and that the plaintiffs should have proceeded against the architect Porter. Plaintiffs' counsel then elected to be non-suited.

Though there was no decision in this case, the instruction to the architect not to pledge the liability of the committee, would appear to have been regarded by the learned judge as an express limitation of the architect's authority, and the case is of value as showing the effect of such a limitation by the employer upon his architect.

Times L. R.
(Q. B.) 8 Feb.
1875.

Again, in *Gwyther v. Gaze*, the defendant instructed his architect to prepare plans for a warehouse, and the latter directed the plaintiff to take out the quantities. Tenders based on these quantities were sent in, but none of them were accepted. The plans were then altered, and the building was proceeded with by a builder who had not tendered in the first instance. The plaintiff sent in his account of fees for the quantities, charging $2\frac{1}{2}$ per cent. on the lowest of the tenders sent in at first. Quain, J., told the jury it was for them to say whether the architect's authority was limited in the way alleged by the defendant, and if it was not so

limited, the defendant was liable to pay the plaintiff a reasonable remuneration for taking out the quantities. The jury returned a verdict for the plaintiff, and the judge, by consent of both sides, assessed the damages at $1\frac{1}{2}$ per cent. on the amount of the lowest tender sent in.

Again, in the case of *Schofield v. Barnardo and another*, which was tried before Coleridge, C. J., and a special jury, the plaintiff was a quantity surveyor, and sued Dr. Barnardo and Mr. Gregg, an architect, for balance of fees alleged to be due for bills of quantities prepared at the request of the defendants. Dr. Barnardo proposed to erect a mission hall, plans were prepared, and plaintiff took out the quantities on instructions from the two defendants. The lowest tender received was 11,200*l.*, which was far over what Dr. Barnardo wished to expend. Changes were then made in the plans, and eventually the building was erected at a lower cost. Dr. Barnardo alleged that he instructed the plaintiff that he was not prepared to spend more than 5,000*l.*, but this was denied. 150*l.* had been already paid on account of the quantities, and the balance claimed was 123*l.* 5*s.* 11*d.* Eventually the jury found for the plaintiff as against Dr. Barnardo 68*l.* 7*s.* 1*d.*, and against Gregg 38*l.* 17*s.* 0*d.* The verdict of the jury as against the architect Gregg can only be understood on the assumption that he had exceeded his authority, and had rendered himself personally liable.

Building
News, 25 Nov.
1887.

Engineer, &c., may incur Liability.—The next class of cases requiring reference are those in which the quantity surveyor has to look to the architect for his fees. Such cases do not often occur in practice, but it is necessary to point out that where an architect retains in the name of his employer a quantity surveyor without an express or implied authority from his employer to that effect, he will be liable to pay the surveyor's reasonable charges. The act of the architect will not be one of agency, he will be in the position of a principal.

This view of the rights of the quantity surveyor is illustrated by the case of

Burnell v. Ellis, in which the claim was by the plaintiff, a quantity surveyor, against an architect for the recovery of fees in respect of the preparation of bills of quantities. The defendant, acting for a company, had prepared plans and specifications of an

The Times
L.R., 25 June,
1866.

intended hotel and stables, and had instructed the plaintiff, Burnell, to take out the quantities. The tenders sent in being too large in amount, the buildings were not proceeded with. The plaintiff then claimed his fees, amounting to 100%. ; but as the work did not go on, and defendant did not expect to get all he was entitled to, he had asked the plaintiff to reduce his charge. The plaintiff then offered to take 50%. It appeared in evidence at the trial that the defendant had paid the plaintiff 10%. 10s., which plaintiff alleged was a payment on account; but which the defendant asserted was a loan. The defendant further alleged that the plaintiff was employed by a builder, and that it was understood he was to look to the company for payment.

The jury, however, took a different view of the facts, and found a verdict for plaintiff surveyor.

The Builder,
1 Feb. 1879.
Lord Mayor's
Court.

Again, the case of *Gordon v. Blackburne* was somewhat peculiar, but it may not be uninteresting. The defendant, an architect, prepared plans of an intended building on instructions from an employer, and requested the plaintiff surveyor to draw up bills of quantities. Defendant had not been instructed to procure tenders, and in previous business transactions plaintiff had been paid his charges through the defendant. At the time he received instructions nothing was said about the client. There was no specification, but there was a name on the drawings. The quantities were sent to the defendant, and by him they were delivered to the builders. Defendant, when applied to for a payment on account by the plaintiff, refused to pay, but said the client was liable.

The jury found, however, on the evidence, that the defendant had personally employed the plaintiff, and brought in a verdict accordingly.

Engineer's position as to Quantities.—A perusal of the foregoing cases will show that the proper course for engineers and architects is to obtain express authority from their clients before calling in the services of a quantity surveyor, should such be requisite as a means of obtaining tenders for intended buildings. This will prevent unpleasantness and possible litigation.

Nor is it advisable for the engineer or architect to supply quantities to intending contractors: for if paid by the party whose tender for the intended works is accepted,

he is placed in a position of difficulty. His decision in settling differences which may arise between the employer and the builder cannot be regarded as perfectly impartial. And, again, there is the possibility of further difficulty in case the builder impugns the accuracy of the quantities, as he is very likely to do whenever a difference arises between the architect and himself on the question of what is and what is not extra work. The builder may seek to hold the employer liable for any loss he may suffer through the incorrectness of the quantities, and this means trouble to the architect.

At the present time the usual and by far the best course is to allow a quantity surveyor, employed by a number of contractors who wish to tender for proposed works, or a surveyor who takes the matter on speculation, to extract the quantities from the drawings and specification. The surveyor then supplies copies of the bills of quantities to the parties tendering, on the terms that the contractor whose tender shall be accepted shall pay for the quantities. Parties tendering in this way add an item to their estimate for surveyor's fees, and thus the employer indirectly pays for the quantities.

Under these circumstances the employer and his engineer or architect are free from all responsibility as to the accuracy of the quantities. If the latter prove to be incorrect, and the contractor suffers loss in having to execute items of work included in the drawings but omitted from the quantities, he must look to the quantity surveyor for satisfaction; he has no remedy against the employer or his professional adviser.

The arrangement under which the person accepted as contractor pays the quantity surveyor works very well, but a difficulty arises when the proprietor does not accept any tender and abandons the proposed scheme of works.

In these circumstances the quantity surveyor loses the value of his work, unless he can recover his fees from the proprietor; and, as has just been pointed out, he will not likely succeed in this unless he can show an authority from the proprietor.

L. R. Ir. 2 C.
L.119. (1878)

The case of *McConnell v. Kilgallon* dealt with a state of facts which may sometimes occur, viz., the abandonment of the works by the contractor. Here the defendant agreed with the surveyor that if the latter would supply the quantities for a building proposed to be erected, he would, if his tender were accepted, pay the surveyor's fees out of the first instalment paid to himself on foot of the building. The surveyor did so furnish the necessary quantities, but the defendant builder subsequently abandoned the contract. On action being brought by the surveyor for his fees, it was held that it was implied that the builder should duly proceed with the building contract; that he was bound to pay the surveyor's fees, having rendered impossible performance of his contract with the surveyor by his own act, and that it was not a condition precedent that the first instalment should be paid.

Agent acting *Malâ fide*.—As a general agent for his client, it has been already pointed out that the engineer or architect must exercise his functions in a manner conducive to the client's interests. He must not only act skilfully but also *bonâ fide*, and, further than this, he must refrain from entering into any bargain or transaction which would in any way result disadvantageously to the employer. In other words, so far as he can do so, and with justice to contractors, he must keep his client safe.

L. R. 10 Ch.
515; 45 L. J.
Ch. 121.
(1875)

The case of *The Panama South Pacific Telegraph Company v. The India-Rubber, &c. Telegraph Works Company* expresses this rule very clearly. In this case the defendants entered into a contract to lay a cable for the plaintiffs, and afterwards made an arrangement with the engineer of the plaintiffs that he should lay the cable for them, and that they (the defendants) would pay him for so doing as they received instalments of their contract price from the plaintiffs. It was held that this agreement between the engineer and the defendant company was a fraud, and that the plaintiffs were entitled to have their contract rescinded. James, L. J., said:

"Any surreptitious dealing between one principal to a contract and the agent of the other principal is a fraud in equity, and entitles the first-named principal to have the contract rescinded, and to refuse to proceed with it in any shape."

Harrington v. The Victoria Graving Dock Company is another case in point, though it does not go so far as the one just quoted. Here the plaintiff was advising engineer to the Great Eastern Railway Company in connection with ships belonging to that company. The defendants were desirous of obtaining the contract for the repairs of some of the company's ships, and the plaintiff was to use his influence with a view to secure the acceptance of the defendants' tender. The defendants were to pay plaintiff a commission for the superintendence by him of the repairs, and the action was brought for the recovery of this commission. It was held, however, that the plaintiff could not maintain his action for commission under the contract, on the ground that, even although the plaintiff had not been induced to act corruptly, the consideration for the contract was corrupt. L. R. 3 Q. B. D. 549. (1878)

And again, in *Smith v. Sorby*, it was held that when a secret gratuity is given to an agent with the intention of influencing his mind in favour of the giver of the gratuity, and the agent, on subsequently entering into a contract with such giver on behalf of his principal, is actually influenced by the gratuity in assenting to stipulations prejudicial to the interests of the principal, although the gratuity was not given directly with relation to such particular contract, the transaction is fraudulent as against the principal, and the contract is voidable at his option. L. R. 3 Q. B. D. 552. (Note.) (1875)

In passing from this part of the subject, it may be observed that very few cases are recorded where professional men have betrayed the trust reposed in them by their employers; and this is all the more remarkable when account is taken of the enormous and costly undertakings which have been executed under the control of members of the engineering and architectural professions. Their reputation for honourable dealing is deservedly high, and it is hoped that the foregoing observations and extracts may prove useful to younger practitioners in pointing out the best method of upholding the good name of their profession.

CHAPTER IV.

LIABILITY OF ENGINEER OR ARCHITECT.

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GENERAL LIABILITY.

IN the preceding chapters, the personal liability of engineers and architects for acts done in the discharge of their professional duties has been several times referred to, but such references were only made incidentally in the discussion of other points. In the present chapter, it is proposed to consider the question of personal liability separately, and in a more or less complete and exhaustive manner.

In considering this question, the first point to be noticed is the persons or parties into contact with whom the engineer or architect, in discharging his duties, is or may be brought. In the first place, there is the employer, whose skilled servant the engineer or architect is. In the second place, there is the contractor, whose work it is the business of the engineer or architect to supervise. In the third place, there is the public, whose rights or conveni-

ence may be interfered with by the engineer's or architect's act or orders. Now, to each of these three parties, the engineer or architect may, under certain circumstances, be held personally liable for acts done in the discharge of his professional duties.

Before discussing the engineer's or architect's personal liability as regards each of these parties, it is perhaps desirable to point out that the ground of his liability to the employer is altogether different from that on which is based his liability to the contractor or to the public. His liability to the employer is grounded on contract. He is retained by the employer to discharge certain duties, and if he does not discharge those duties with what the Court considers reasonable skill and care, he is liable for breach of contract. But he is under no contract with regard to the contractor and the public, and so any liability he has towards them must arise from acts or conduct in themselves either wrongful or criminal.

For the sake of convenience, we will consider the personal liability of the engineer or architect as regards the three classes before mentioned in the reverse order of that given above, and so begin with his liability to the public.

I. LIABILITY TO THE PUBLIC.

The engineer or architect may be personally liable to the public generally, in which case his liability is in its nature penal, or to an individual member of the public, in which case his liability is in its nature compensatory.

First, with regard to his liability to the public generally.

One of the most important ways in which he may become liable to the public generally is under the Public Health Act of 1875.

38 & 39 Vict.
c. 15, s. 193.

Public Health Act.—Sect. 193 of this Act runs as follows:—

“Officers or servants appointed or employed under this Act by the local authority shall not in any wise be concerned or interested in any bargain or contract made with such authority for any of the purposes of the Act.

“If any such officer or servant is so concerned or interested, or, under colour of his office or employment, exacts or accepts any fee or reward whatsoever other than his proper salary, wages, and allowances, he shall be incapable of afterwards holding or continuing in any office or employment under this Act, and shall forfeit and pay the sum of fifty pounds, which may be recovered by any person, with full costs of suit, by action of debt.”

This enactment has been modified by provisions in the Public Health (Members and Officers) Act, 1885, and the Public Health (Officers) Act, 1884.

48 & 49 Vict.
c. 53, s. 2.

By sect. 2 of the first of these Acts, notwithstanding anything in the 193rd section of the principal Act, or any similar restrictions in any local Act, to the contrary, an officer or servant appointed under the Act may lawfully be interested or concerned in any contract with the local authority for the sale, purchase, leasing, or hiring of any lands, rooms, or offices, or may be concerned in any contract with the local authority as a shareholder in any joint stock company, provided the contract be consented to by two-thirds of the members of the local authority present at a meeting held after seven clear days' notice shall have been published in some newspaper circulating in the neighbourhood, and after notice shall have been sent in writing to every member stating the nature of the contract, and the time and place of the meeting at which the question is to be considered.

47 & 48 Vict.
c. 74, s. 2.

By sect. 2 of the second Act, proceedings for the recovery of any penalty under the 193rd section of the Public Health Act, 1875, shall not be taken, except with the consent in writing of the Attorney-General.

It has been decided that contracts coming within sect. 193 of the principal Act not only subject the officer who is concerned in them to a penalty of 50*l.*, but are also illegal

and void. This was held in the case of *Meliss and another v. The Shirley Local Board*, a case previously quoted upon another point. L. R. 16
Q. B. D. 446.
(1886)

In this case, Meliss, together with Pim, who was the Local Board's surveyor at a salary of 150*l.* a year, offered to carry out as joint engineers certain drainage works which the Local Board were about to construct. Their offer was accepted, but afterwards the Local Board abandoned the intended works. Meliss and Pim brought an action to recover 530*l.* for work done and services rendered. It was held that they could not recover. In the Court of Appeal, Lord Esher, M. R., observed: "It seems to me, considering the object of the enactment, that the intention of the legislature was that such a contract should not be entered into. The amount of the penalties, contrasted with the nature of the subject, brings me, though I must confess with regret, to the conclusion that the contract is void, and the plaintiffs cannot sue on it."

The next point to be considered on sect. 193 is this: When will an officer or servant be considered to be "interested or concerned" in a bargain or contract with the local authority? The section was not intended to forbid reasonable allowances to officers over and above their usual salaries for extra work done by them in connection with contracts entered into by the local authority. Sect. 189 of the Act expressly permits payments to officers of "reasonable salaries, wages, or allowances."

In *Reg. v. Prest*, where an officer was engaged by a corporation to act as the professional adviser "of the mayor and council in the business of the council," it was held that carrying out his advice was extra work, to be paid for by an extra allowance. And in *Reg. v. Gloucester (Mayor, &c.)*, where a surveyor was retained by a corporation at a salary of 50*l.* a year, and he did extra work in connection with the construction of certain water-works, it was held that 100*l.* was a reasonable allowance. 16 Q. B. 32.
(1850)

33 L. T.
(O. S.) 145;
23 J. P. 709.
(1859)

While, however, the section does not forbid reasonable allowances for extra work, still, when a contract may afford an officer any profits beyond his salary and a reasonable

allowance, or when it arranges his allowance in a way which gives him an interest antagonistic to the interests of his employers (the local authority), he will be held to be "concerned or interested" in it within the terms of the section. A few cases may be given in proof and illustration of this rule.

The cases of *Burgess v. Clark* and *Todd v. Robinson*, both decided before the passing of the Public Health (Members and Officers) Act, 1885, may be mentioned.

L. R. 14
Q. B. D. 735.
(1885)

In *Burgess v. Clark* an officer of a local board let rooms to the board at a rent for the transaction of the board's business, and it was held that the letting of the rooms was a bargain or contract with the board such as is prohibited by sect. 193, and that the rent payable for the room could not be considered an "allowance" to the officer in addition to his salary within the meaning of sects. 189—193, it being unconnected with the performance of any services in the course of his employment under the board.

L. R. 14
Q. B. D. 739.
(1885)

In *Todd v. Robinson* it was held that an officer of a local board who was a shareholder in a company having a contract with the board, was, so long as the contract existed, "interested in a bargain or contract" with the board within the meaning of sect. 193, and if the contract was capable of producing any profit to the shareholders, he was liable to the penalty imposed by that enactment.

It was in consequence of the decisions in *Burgess v. Clark*, and in *Todd v. Robinson*, that the Public Health (Members and Officers) Act, 1885, was passed.

In contrast to these two cases may be cited the decision in

27 J. P. 741.
(1863)

Wednesbury Local Board v. Stevenson, a magistrate's case. There notice had been given by the sanitary authority to the owners of certain houses to repair them. On owners neglecting so to do the sanitary authority repaired, and the surveyor apportioned the expenses of doing so among the owners. The owners refused to pay, on the ground that the surveyor was interested in the contract through his being patentee and receiving royalties on certain bricks used in effecting the alterations. It was held, however, that he was not interested within sect. 193.

22 Q. B. D.
744. (1889)

The case of *Nutton v. Wilson* may also be mentioned. Here the

action was against a member of the local board, not an officer, but the principle of the decision applies equally to proceedings under sect. 193. The defendant was a member of a local board which had given a contract to one Holdsworth, and he, being a joiner, executed for Holdsworth part of the work under the contract. It was not suggested that there was any corrupt intention. The Court of Appeal held that the defendant was concerned in the contract. In giving judgment, Lord Esher, M. R., said: "I adhere to what I have before said with regard to provisions of this kind. They are intended to prevent the members of local boards which may have occasion to enter into contracts, from being exposed to temptation, or even to the semblance of temptation." And Lord Justice Lindley said "the expression 'in any manner concerned' is a somewhat lax one. Cases may be put in which a person might perhaps be said in one sense to be concerned in a contract entered into by the board, and yet it might be tolerably obvious that he is not 'concerned in the contract,' in the sense in which the Act uses the words. To interpret words of this kind, which have no very definite meaning, and which perhaps were purposely employed for that very reason, we must look at the object to be attained. The object obviously was to prevent the conflict between interest and duty that might otherwise inevitably arise."

But the most important case for the consideration of officers of local authorities is that of *Whiteley v. Barley*, which lately came before the Court of Appeal.

L. R. 20
Q. B. D. 196;
21 Q. B. D.
154. (1888)

The defendant Barley was the surveyor to the Corporation of Ramsgate, and in the course of his duty as such he prepared plans and specifications for sundry works of improvement proposed to be carried out by the corporation. The defendant supplied bills of quantities of the intended works to parties tendering, on the terms that he was to be paid $2\frac{1}{2}$ per cent. on the total contract amount by the person selected as contractor, and he was the person who was to certify the total amount payable to the contractor at the completion of the works. Further, the corporation carried out a large scheme of sewerage works under the defendant as engineer, and agreed to pay him, over and above his ordinary salary, a commission on the costs of the works not exceeding 780*l.* in all. In the contract agreement relating to the sewerage scheme there was a claim to the effect that the contractors were to pay the defendant $1\frac{1}{2}$ per cent. on the total cost, as certified by him, for bills of quantities supplied by him to such contractors.

The plaintiff brought his action against the defendant surveyor

38 & 39 Vict.
c. 51, s. 193.

on the ground that he was interested in a contract with the corporation, and that he had accepted fees and rewards other than his proper salary within the meaning of the 193rd section of the Public Health Act, 1875, and that he had in consequence rendered himself liable to penalties as prescribed by that section.

The defendant alleged in his defence that the money received by him from contractors for the bills of quantities was paid over, or would be paid over, to the corporation, less cash out of pocket, in accordance with an agreement between the defendant and his employers, the corporation. At the trial, before Mathew, J., and a special jury, the question left to the jury was, did such an agreement exist? The jury found in the negative, and the judge gave judgment for the plaintiff, holding that in connection with certain of the contracts, the defendant had rendered himself liable to penalties.

The case went to the Court of Appeal, where Mr. Justice Mathew's decision was confirmed. Lord Esher, M. R., remarking—"That the defendant's position was such as this enactment strikes at, seems to me to be clear. He was to be paid by a percentage on the contract price, and so the larger that was, the larger would be his remuneration. Therefore it would be to his interest that he should make the quantities as large as they could be made. There is no reflection on his honour or integrity, but the statute affects all who are brought within the terms of it, and not merely those who yield to temptation. With regard to the penalty incurred with respect to the sewerage works, the defendant's position as to the liability of the contractors to pay him a percentage, is precisely the same as in the case I have already dealt with. I think, therefore, the judgment of the learned judge (Mathews, J.) was right, and should be affirmed." The other members of the Court, Lindley and Lopes, L. JJ., concurred in the decision of the Master of the Rolls.

In looking at the decision in this case, it must be admitted that the practice of supplying bills of quantities at a price to be paid to the surveyor of the board by the contractor, is open to very adverse comment, and the observations of Lord Esher on this part of the case will be concurred in by most persons. But that it is illegal for a surveyor to accept a commission from his board on the costs of the works which entail extra labour upon him, will strike most readers with surprise. The decision of the Court of Appeal is, however, clear; and until it is

reversed or overruled by the House of Lords, it must be taken as indicating the effect of the 193rd section of the Public Health Act, 1875.

All payments, therefore, by corporations acting under the powers of this Act made to their officer for special or extra services, must be by increase of salary, or calculated in some way other than being made contingent on the cost of works which are under the control of such officers.

Commissioners Clauses Act, 1847.—The decision in *Whiteley v. Barley*, though based upon the 193rd section of the Public Health Act, 1875, may, and probably will, affect officers and servants of corporations not acting under this Act. Many private Acts relating to boards of commissioners incorporate the Commissioners Clauses Act, 1847. Now the 67th section of this Act is of the same scope as the 193rd section of the Act of 1875, the words of the section are as follows :—

10 Vict. c. 16,
s. 67.

“Every officer employed by the commissioners who shall exact or accept, on account of anything done by virtue of his office, or in relation to the matters to be done under this or the special Act, any fee or reward whatsoever other than the salary or allowances allowed by the commissioners, or who shall be in anywise concerned or interested in any bargain or contract made by the commissioners, shall be incapable of being afterwards employed by the commissioners, and shall forfeit the sum of fifty pounds; and any person may sue for such penalty by action of debt or on the case in any of the superior Courts, and shall on recovery thereof be entitled to full costs of suit.”

It will be seen there is a difference in the wording of the foregoing section of the Commissioners Clauses Act, 1847, and the 193rd section of the Public Health Act, 1875, but this difference is not of such a character as to avoid the conclusion that the decision in *Whiteley v. Barley* would apply with equal force to cases of the same kind arising under the former Act.

Allowances to Officers.—The facts of *Whiteley v. Barley* were again before the Court in the very recent case of

23 Q. B. D.
66. (1889)

The Queen v. The Mayor, &c. of Ramsgate. Here the point before the Court was this: Before the decision in *Whiteley v. Barley*, the local authority of Ramsgate had voted and paid part of the commission referred to in that case to Barley, the borough engineer. After the decision, they voted and paid him not merely the remainder of the commission, but a sum of money to recompense him for the penalties he had to pay, and the costs he was put to in that case. Thereupon a rule *nisi* was obtained by a ratepayer for a *certiorari* to bring up these resolutions voting the money, that the same might be quashed, on the ground that they were illegal and *ultra vires*. The Court made the rule absolute. In giving judgment, Mr. Justice Field said: "We have been called upon by the defendant not to make the rule absolute, on the ground that it is a matter within our discretion, according to the express terms of the section under which the rule has been moved (45 & 46 Vict. c. 50, s. 141), whether we should issue the *certiorari* or not, and that under the circumstances of this case we ought in our discretion to refuse the writ. There has been cited to us the case of *Reg. v. Prest*, as an authority for the proposition that where a sum of money has been *bonâ fide* paid by a corporation for services rendered, and such sum is nothing more than a fair and just sum to be paid for the benefits which it has received, the Court will not interfere to set that payment aside merely because it is in form *ultra vires* and illegal by reason of its non-compliance with some statutory provision. And it was said that the payment to the surveyor in this case having been made honestly, and being a fair and reasonable payment in respect of services, the benefit of which the ratepayers had enjoyed, was a matter which was in fact harmless, and one with which we ought not to interfere. But I cannot agree that it was harmless, it was not a mere irregularity, but a payment which was positively prohibited by the statute."

16 Q. B. 32.

Counsel for the defence had, in his argument, asserted that the payments to Barley for his services to the corporation would have been legal as an "allowance" within the Act, had they been voted in a lump sum and not as a commission on the cost of the works. This led Mr. Justice Field to express his opinion as to the meaning that should be attached to the word "allowances." He said: "An authority was cited giving a definition of the word allowance as being 'a payment beyond the agreed salary of the officer for additional services rendered by him.' But I think that the defini-

tion is too large. To my mind an 'allowance' means an allowance of something other than money, and does not include pecuniary payment." The other member of the Court—Cave, J.,—although inclined to concur in Mr. Justice Field's definition, did not express a decided opinion on the point, holding that it was not necessary for the decision of the case.

The definition referred to by Mr. Justice Field was that given to the word "allowance" by Brett, M. R., in the case of *Burgess v. Clarke*, and it may not be presumptuous to say that it appears to us to be a more correct definition than that assigned to it by Field, J. At any rate, it is the meaning hitherto attached to it by every corporation in their dealings with the members and officers. When either of these are put to extra labour and expense, it is customary to vote them in consideration an allowance of so many pounds, and the legality of such proceedings, as far as we are aware, has never been questioned. The fears expressed by Cave, J., that holding that allowances included money payments might lead to much jobbery and corruption, are unfounded, or at any rate futile, since, if allowances of money were declared illegal, there can be no doubt but that corporations in similar cases, instead of voting money as an allowance, would simply vote an increase of salary, a proceeding which could not be questioned.

Since the above was written, the case of *Edwards v. Salmon* has been reported.

14 Q. B. D.
738. (1885)
See *supra*,
p. 76.

23 Q. B. D.
531. (24th
July, 1889)

It was an action for the 50*l.* penalty under sect. 193. The defendant was town clerk of Bury St. Edmund's, and he had been appointed at a fixed salary, which was "to include all legal charges, except for contentious business matters, travelling expenses, and payments out of pocket." Subsequently, the council having undertaken the construction of some sewerage works, extra labours were cast upon the defendant, and to compensate him the council, on the conclusion of the works, by resolution granted him 500 guineas. On trial, judgment was given for the defendant. On appeal, the

Court dismissed the case without calling on the defendant's counsel. Lord Halsbury, L. C., while not deciding what was meant by "allowances," held that on the facts the case did not come within section 193. Lord Esher, M. R., concurred, adding, that notwithstanding the criticism to which his definition of the word "allowances" in *Burgess v. Clarke* had been subjected, he did not alter one word of what he there said.

The penalties under sect. 193 of the Public Health Act, 1875, are made recoverable by action of debt, so they are not strictly criminal in their nature. Perhaps a few words should be said of the strictly criminal responsibility to the public of an engineer or architect.

Criminal Liability.—The engineer or architect, like every one else, is, generally speaking, criminally responsible only for his own acts or omissions. Thus, he is criminally responsible for what he does or orders to be done, but not for the way others carry out his orders, unless it is part of his duty to see that his orders are properly carried out, in which case he may be held responsible if in the opinion of the jury he was grossly negligent. Two cases may be cited to show the amount of negligence which will be considered criminal.

7 Car. &
Payne, 153.
(1835)

In *Rex v. Allen*, the prisoner was the captain of a steamer. While the steamer under his and a pilot's charge was coming up the Thames one dark night, it came into collision with a smack which showed no lights. Loss of life occurred, and the prisoner was indicted for manslaughter. On trial, evidence was given that when the collision took place, the prisoner and the pilot were on the bridge, but there was no look-out on the bows. It was shown, however, that an hour previous to the collision, the captain had placed a man there. It was held that there was no evidence of such negligence as would make the captain criminally responsible.

2 C. & K. 368.
(1847)

In *Reg. v. Haines*, the charge arose out of an explosion of fire-damp in a mine of which prisoner was manager or overseer. It was alleged by the prosecution that the explosion would not have occurred if the prisoner had caused an air-heading to have been put up, as it was his duty to have done. For the defence, it was alleged that it was the duty of one of the persons killed to have reported to

the prisoner that an air-heading was required, and that he had not done so. Maule, J., in summing up, said: "The questions for you are whether it was the duty of the prisoner to have directed an air-heading to be made in the mine, and whether by his omitting to do so, he was guilty of a want of reasonable care and ordinary precaution. If you are satisfied that it was the plain and ordinary duty of the prisoner to have caused an air-heading to be made in this mine, and that, by the omission, the death of the deceased occurred, you ought to find the prisoner guilty of manslaughter. It has been contended that some other persons were on this occasion also guilty of neglect; still, assuming that to be so, their neglect will not excuse the prisoner, for if a person's death be occasioned by the neglect of several, they are all guilty of manslaughter, and it is no defence for one, who was negligent, to say that another was negligent also, and thus, as it were, to divide the negligence among them."

Again, in *Rex v. Senior*, the prisoner was charged with having killed a child in the exercise of his calling as a man-midwife. The judge, Bolland, B., observed, in his charge to the jury, "That in the case of the second trial of St. John Long at the Old Bailey, all the judges agreed, at a previous consultation, that if any medical man . . . by gross negligence, by tampering with the health of his patients, and by making experiments with new medicines of unknown power, or by gross ignorance, shall cause death, he shall be answerable for the consequences. But if a person, having skill and experience, and anxious to use that skill to the best of his knowledge and judgment, shall by any mistake so practise as to cause death, he shall not be legally answerable for it."

Chester
Assizes,
April, 1832.
1 Lewin C. C.
183, n.
See 4 C. & P.
398.

Liability for Torts.—The next class of cases of liability to the public is where engineers and architects, while acting for corporations, companies, or persons in whose employment they may happen to be, render themselves personally liable in damages to individual members of the public.

Before going further, it should be pointed out that no such personal liability arises under the Public Health Act, 1875.

38 & 39 Vict.
c. 15, s. 265.

By sect. 265 of that statute, it is enacted that "No matter or thing done, and no contract entered into by any local authority, or joint board or port sanitary authority, and no matter or thing done by any member of any such authority, or by any officer of such authority,

or other person whomsoever acting under the direction of such authority, shall, if the matter or thing were done or the contract were entered into *bonâ fide* for the purpose of executing this Act, subject them or any of them personally to any action, liability, claim, or demand whatsoever; and any expense incurred by any such authority, member, officer, or other person acting as last aforesaid, shall be borne and repaid out of the fund or rate applicable by such authority to the general purposes of the Act."

7 E. & B.
426; 26 L. J.
Q. B. 142; 21
Jur. 557.
(1857)

To show the extent of the protection afforded by this provision, the case of *Ward v. Lee*, decided on a similar provision in the Metropolitan Commissioners of Sewers Act, may be referred to.

11 & 12 Vict.
c. 112, s. 128.

There the defendant was a contractor, who, in altering a sewer under the direction of the Commissioners of Sewers, created a nuisance to the injury of the plaintiff's premises. He did the act in the *bonâ fide* execution of the Act. Held, that he was not liable. Wightman, J., said: "We are of opinion that the effect of the section is to absolve from liability to an action persons who, acting under the direction of the commissioners, do some matter or thing *bonâ fide* which, but for that clause, would subject them to an action."

In all cases, however, not coming within the protection of sect. 265 of the Public Health Act and similar statutory provisions, the engineer or architect is equally liable with the employer for any wrong done to third persons in the discharge of his duty as engineer or architect. The employer is liable on the ground that the engineer or architect is his agent or servant, on the principle *respondeat superior*. The engineer or architect is liable because he is the person who actually did or authorized the wrongful act, and he cannot escape liability by showing that he did it by the direction of the employer. In such cases it lies with the person injured whether he shall bring his action against the employer or the engineer. As a matter of fact, he usually brings it against the employer, but he is in no way bound to do so, and if he sues the engineer, and obtains damages, the engineer cannot compel the em-

ployer to indemnify him in any way or to any extent. The rule is, that among tort-feasors there is no contribution, *i. e.*, when damages are recovered against one of several persons jointly liable for a wrong, the one mulcted cannot claim from the others any share of the damages he has had to pay.

The professional man is then liable personally for the wrongful acts he does or authorizes to be done. There, however, his liability ceases. If the act authorized to be done by him is in itself a lawful act, and capable, if done skilfully, of being done without injury to any one, he is not liable if, in doing it, an injury is done to some one through the want of care or skill in the contractor or his workmen. The relation of master and servant does not exist between the professional man and the contractor, and consequently the maxim *respondet superior* does not apply.

As was said in *Monks v. Dillon*, by Palles, C. B., "In *Butler v. Hunter Pollock*, C. B., says, 'No doubt when the act is in itself a nuisance, the party who employs another to do it is responsible for all the consequences, for then the maxim *qui facit per alium, facit per se* applies. But when the nuisance arises, not from the act itself, but from the improper mode in which it is done, the person who authorized it is not responsible unless the relation of master and servant exists.' What is here said of an act 'in itself a nuisance' is equally applicable, in my opinion, to an act in itself a trespass, or to any other act in itself unlawful."

12 L. R. Ir.
321. (1883)
See *infra*.
7 H. & N. 826.
(1862)

The personal liability of an engineer or architect and its limitations will be made clear from the following cases:—

In *Mill v. Hawker and Wickett* personal liability was incurred by the surveyor to a highway board for an act of trespass committed by him, acting under the orders of his employers. At a meeting of the board it was resolved that a path running through land in the occupation of the plaintiff was a highway, and that the plaintiff be directed to remove a lock from a gate placed across the path. The surveyor of the board was afterwards ordered to remove the lock, and did so. The plaintiff then brought an action against the members of the board in their personal capacities, and against the

L. R. 9 Ex.
309; 10 Ex.
92. (1875)

5 & 6 Will. 4,
c. 55.
Highway
Act, 1862,
25 & 26 Vict.
c. 61.

surveyor. The plaintiff was non-suited, on the ground that the defendants were not liable individually. The Court of Exchequer set aside the non-suit and ordered a new trial, on the ground that, assuming the resolution to be illegal, the members of the board who concurred in it were personally responsible, and that the fact that the surveyor was bound to obey the orders of the board did not excuse him if, in obeying this order, he did an unlawful act. When the case came before the Exchequer Chamber, no opinion was expressed as to the liability of the members of the board, but it was held that the surveyor was liable.

Building
News, 1st
July, 1887.

Again, in *Walters v. Adair*, the plaintiff was the owner and occupier of land fronting a public road in Ireland, and he brought this action against the defendant, who was the county surveyor, for breaking and entering his close, and pulling up and destroying a thorn-hedge, his property. The defendant alleged that the hedge projected too far over the public road, but the judge told the jury that no justification had been shown for the acts complained of, and that the case resolved itself into a question of damages. The jury thereupon brought in a verdict for the plaintiff.

12 L. R. Ir.
321. (1883)
Court of
Appeal.
See *supra*,
p. 85.

Another Irish case already referred to, viz., that of *Monks v. Dillon*, may now be cited at some length.

The defendant was engineer to a drainage board, and the plaintiff was an occupier of lands, on a portion of which the board had statutory powers to execute certain works. The plans and specification showed the works to be executed on the plaintiff's lands, and the agreement between the board and their contractor bound the latter to carry out the works in accordance with the plans and specification and the orders of the defendant engineer.

The board had not acquired the lands or paid compensation to the plaintiff, as provided by the statute under which the board was constituted.

In the course of his operations the board's contractor entered upon the lands of the plaintiff, and proceeded with the works, and the engineer, by himself and his assistants, superintended the works, and gave all necessary orders relating to the same.

The plaintiff thereupon brought an action for trespass against the engineer, Dillon, and obtained a verdict and damages. The case found its way into the Court of Appeal in Ireland, where it was held that the defendant engineer was liable for the trespass, and the verdict was allowed to stand: Law, C., observing that, "It therefore seems to me impossible to regard Mr. Dillon in any other light than as a person constructively liable for the acts which

he not only authorized, but even directed to be done, and employed superintendents or assistants to see that they were done as he had directed."

This case was decided on the principle that all parties to a trespass are liable, including company, engineer, and contractor. It may appear at first sight that the party aggrieved should have proceeded against the contractor, who was the actual trespasser. On the other hand, the contractor was entitled to assume that he was at liberty to enter on the lands in question, because they were shown as the site of portion of the works of his contract, and he was entitled to take for granted that the Board had done all the acts necessary to acquire the land.

In *Lusby and Others v. Greenwood and Woollet*, which came before Grove, J., and a special jury, the plaintiffs were workmen employed by the defendant Greenwood, a builder, to erect a scaffolding for the purpose of taking down a wall of a building injured by a fire. The wall fell during the operations, and the plaintiffs alleged the failure was due to the want of shoring. Woollet was the surveyor to an insurance company, and directed the operations, but the latter were carried out under the immediate orders of Greenwood. The plaintiffs were injured by the fall of the wall. The learned judge considered that Woollet had acted as a mere general adviser, and told the jury he was not liable. Verdict against Greenwood.

Building
News, 31st
July, 1885—
Q. B. D.

II. LIABILITY TO THE CONTRACTOR.

As has already been pointed out, the legal relation between the engineer or architect and the contractor is altogether different from that between him and the employer. The relation between the employer and the architect or engineer is the relation of master and servant. The professional man is the skilled servant of the employer, and is bound by his contract to display reasonable skill and care in the discharge of his duties. If he fail to display

See Chap. II.

such reasonable skill and care, he is guilty of a breach of contract, and may be held liable for any damage resulting from his ignorance or negligence. But no such relation of master and servant exists between him and the contractor, and so he is under no obligation, as far as the contractor is concerned, to show either care or skill in the discharge of his duties. On principle, then, it would appear that to make him personally responsible to the contractor, mere ignorance or negligence is not enough; he must be guilty of wilful misconduct amounting to fraud or of misrepresentation.

Liability for Certificates.—The question of wilful misconduct on the professional man's part most frequently arises in connection with the granting of certificates. As will be explained further on, sometimes a contract is so worded as to make the certificate of the engineer or architect a condition precedent to the enforcement of a claim by the contractor for payment for work done. Where such is the case, and the engineer or architect refuses the necessary certificate, the contractor is placed in an awkward position. Unable to recover against the employer, he is very much inclined, if he think the certificate was refused without good cause, to endeavour to hold the engineer or architect personally liable. To do so it is not enough to prove want of care or skill on the engineer's or architect's part; it is necessary to prove that the certificate was refused by him unfairly and fraudulently. This will appear from the case of *Stevenson v. Watson*.

4 C. P. D.
148. (1879)

In *Stevenson v. Watson*, the plaintiff was a builder, who contracted with a company to build a hall, &c. The defendant was the architect agreed on between the plaintiff and the company. By the terms of the contract, all additions and deductions were to be made according to the orders of the defendant, and all matters in dispute between the plaintiff and the company were to be referred to him, and payment was only to be made on his certificate. The defen-

dant certified for what the plaintiff considered an insufficient amount, and the plaintiff in consequence brought an action for damages against the defendant, alleging that the defendant did not exercise care and skill in ascertaining the amount due to the plaintiff, but not alleging fraud on the defendant's part, or collusion between him and the company. Held, that as defendant, in granting certificates, was in the position of a quasi arbitrator, he was not liable for want of care or skill; he was only bound to give an impartial decision.

But where it is alleged and proved by the contractor, in an action for an account or for money alleged to be due on part of work done under a contract, that the certificate has been withheld under circumstances amounting to fraud, the engineer or architect may be held liable individually; and if there has been collusion between him and the employer, he may be held liable individually or jointly with the employer. But the engineer or architect will not be held responsible for the wrongful acts of the employer unless he has been thereby influenced to withhold the certificate.

This is probably the law, though it must be admitted that there is little authority to prove it. That is owing to the fact, perhaps, that as a rule the contractor seeks reparation not from the engineer or architect but from the employer. Only one or two cases tending to support the above statement of the law can be cited.

The first is *Ludbrooke v. Barrett*. This was an action against an architect. The statement of claim alleged that the defendant, with the view of earning his commission, induced the plaintiff to offer to erect certain buildings for a fixed sum for one Ridgway, and he promised that if plaintiff did so erect these buildings to his (defendant's) satisfaction, that he (the defendant) would give certificates for payment. Plaintiff averred that he did erect the buildings according to the plans and specifications, and that the defendant admitted to plaintiff and to plaintiff's solicitor that they were to his satisfaction; but that nevertheless the defendant falsely and fraudulently, and in collusion with Ridgway, refused to give the certificates for payment, and that accordingly the plaintiff was damaged. To this statement

46 L. J.
C. P. 798.
(1877)

of claim the defendant demurred. Held, that the statement of claim showed a good cause of action.

In giving judgment, Grove, J., said, "The statement of claim therefore shows that the defendant, the architect, had an interest in the matter, and that he procured the tender from the plaintiff to do the work which he accepted. It shows also a duty on the part of the defendant and a breach of such duty, and a fraudulent collusion with another person to abstain from doing that which was a lawful act to do, and a damage resulting to the plaintiff from the defendant's so abstaining to do such act. All these are, in my opinion, elements to constitute a good cause of action."

From the judgment in this case it is not clear whether the Court would have held the architect liable if he had not been a party to inducing the plaintiff to make the tender, and if he had not promised in consideration of his making the tender to grant certificates. From a remark, however, made by Lord Coleridge, L. C. J.,

L. R. 4
C. P. D. 158.
(1879)

In *Stephenson v. Watson*, it would appear that it would. The Lord Chief Justice said in that case: "Where the building owner and the architect collude together, and in collusion the architect fraudulently abstains from doing his duty towards the builder, there is authority for saying that he can maintain an action against the building owner (*Batterbury v. Vyse*) or the architect (*Ludbrooke v. Barrett*)."

2 H. & C. 42.
(1863)
46 L. J.
C. P. 798.
(1877)

3 Giff. 70.
(1862)

The case of *Pauley v. Turnbull*—a case in equity—may also be mentioned.

In this case, the plaintiff, a builder, filed a bill in equity against the employer and his architect as co-defendants. He alleged that he had carried out the works in a workmanlike manner and in accordance with the plans and specifications. The decision of the architect was, by a clause in the contract, final in all matters between the parties; and against the architect the plaintiff alleged unfair conduct, that he had only granted certificates to a certain amount under the contract price, and that he had ejected the plaintiff from the buildings and had finished them himself.

In giving judgment in the case, Stuart, V. C., observed, "Upon the result of the evidence, I come to the conclusion, without any doubt remaining on my mind, that the plaintiff was not fairly treated; and without imputing fraud to the defendants, it is proved

by the evidence of at least five credible witnesses, whose testimony cannot be impeached, that the conduct of the defendant architect was not of that discreet, impartial, and fair description which it ought to have been." At the hearing, evidence was produced to the effect that the architect had acted throughout in a manner which was both improper and grossly unfair.

The Court decreed as follows: "It appearing from the evidence that the defendant Hay (the architect) acted improperly and unfairly in the exercise of the powers conferred upon him by the contract in the pleadings mentioned, declare that the plaintiff is entitled to recover from the defendant Turnbull (the employer) the full amount of 2,590*l.* for the contract price, and the sum of 190*l.* for extra work." The plaintiff was also relieved from penalties, and the Court declared the decision of the defendant architect not binding, and ordered the employer and architect to pay the costs of the suit.

It is to be observed that the decree was not against the architect, but against the employer; and further, that the architect's conduct, though unfair, could hardly be called fraudulent. This seems to be the only case where conduct less than fraudulent has been held to vitiate the professional man's decision.

As a rule, the *bona fides* of the engineer or architect is impeached by the contractor for the purpose not of claiming damages from him, but of obtaining from the employer the balance due, or alleged to be due, to the contractor for work done. The action is then against the employer, and in order to make him liable it must be shown not merely that the engineer or architect acted unfairly, but that he did so in collusion with the employer. This point will be discussed at length further on. See *infra*,
p. 181.

The engineer or architect is personally liable for misrepresentation. The misrepresentation may apply to the professional man's own position as agent of the employer, or it may be of some collateral circumstance, by virtue of which the contractor is induced to undertake some obligation. The former is usually called misrepresentation of authority, and with it we will deal first.

Misrepresentation of Authority.—The question of misrepresentation of authority usually arises in connection with the ordering of material, or of new work. The professional man, as the agent of the employer, can, as we have shown before, bind the employer by acts done within the scope of his employment. By acts outside those limits he does not bind his employer, unless he has received special authority from the employer to do so. Ordering material, or new works, are acts outside the general scope of his authority. Accordingly, if he order material, or new works, representing himself to have received authority to order them, when as a matter of fact he has no such authority, he will be personally liable to the contractor not only for the value of the material, or new work, but also for the costs of any reasonable proceeding which the contractor took to recover that value from the employer.

18 C. B. 786.
(1856)

Randall and another v. Trimen, is a case in point. There the defendant was an architect employed by the Rev. T. Ireland and others, the committee of St. Thomas's Church, Oldham, to superintend the erection of a church. The declaration stated that he falsely and fraudulently represented that he was authorized by the aforesaid employers to order stone of the plaintiffs for building the church; and the plaintiffs, believing that he had such authority, though he knew he had not, supplied the stone to the employers' account. The employers refused to pay for the stone, and an action against them was dismissed. On demurrer, held—(1) That the declaration set forth a sufficient cause of action; and (2) That the plaintiffs were entitled to recover the value of the stone supplied, and also their costs in the action they brought against the employers. In argument, the following passage occurred: "Jervis, C. J.: The defendant is clearly liable for his misrepresentation as to his being authorized to order the stone in the name of the Rev. Mr. Ireland. Counsel: Even though he were honestly mistaken? Jervis, C. J.: Yes."

7 E. & B. 301;
on appeal, 8
E. & B. 647.
(1857)

This case was followed in *Collen v. Wright*, the leading case on the subject. There the defendant, professing to act as agent to one Gardener, agreed to grant a lease to the plaintiff. It turned out that, though he honestly believed he had, yet actually he had not,

authority to do so. Plaintiff having been defeated in a suit for specific performance of agreement against Gardener, brought an action against defendant for damages for breach of promise that he had authority to agree on behalf of Gardener for the grant of the lease, and for the costs of the suit for specific performance. Held, that plaintiff was entitled to recover on both points. On appeal the decision was affirmed, Cockburn, C. J., dissenting. Willes, J., in giving judgment on appeal, summed up the law as follows:—"The obligation arising in such a case is well expressed by saying that a person professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract, upon the faith of the professed agent being duly authorized, that the authority which he professes to have does in point of fact exist."

Liability for Plans, &c.—Hitherto it has been considered that the engineer or architect, no more than the employer, warranted the correctness or feasibility of plans, specification, or bills of quantities supplied to the contractor by him as agent of the employer; and that consequently he was not liable for honest blunders in them, though due even to gross negligence, but only for wilful inaccuracies amounting to fraudulent misrepresentation. The following decision, however, makes this view doubtful:—

The very recent case of *Cann v. Willson*, though it does not refer to discharge by an engineer or architect of his duties in superintending the erection of works, is yet on a point so germane, and is moreover likely to lead to such important consequences, if the principle of it be henceforth acted upon by the Courts, that it is desirable that it should be cited at some length.

67 L. J. Ch.
1034; 39
Ch. D. 39.
(1888)

A., the owner of some property, desired to borrow money on the security of it. He applied to Messrs. Cann & Co., solicitors, with this object. They, in reply, stated that they could not negotiate until A. obtained a valuation of the property in question. In consequence of this, A. retained the defendant, Willson, to make a valuation. Willson supplied A. with the required valuation, and A. forwarded it to the plaintiffs, Messrs. Cann & Co. The latter, before advancing any money to A., wrote to the defendant, and pointing out to him that the valuation was wanted for the purpose of a mortgage, asked him if it was correct. Willson replied to their letter that it was correct. On faith of this reply, Messrs. Cann & Co. advanced to A. certain money on the security of the

11 Q. B. D.
503.
(1883)

property. Afterwards it turned out that Willson's valuation was grossly inaccurate, and Messrs. Cann & Co. sued him for the loss to them arising from the inaccuracy of the valuation. It will be observed that there was no contract between Messrs. Cann & Co. and Willson. Willson had been retained to make the valuation, not by them, but by the mortgagor, A. Nevertheless, Chitty, J., held that Willson was liable for the loss occasioned to Cann & Co. through the gross inaccuracy of the valuation. His Lordship held that he was liable, (1) on the principle of *Heaven v. Pender*, which decides that when one supplies anything for a certain purpose, and knowing that it is to be used for that purpose, he is liable independently of contract if the thing supplied be so unfitted for the purpose as to cause damage to the person so using it; (2) on the ground of false representation. His Lordship would not say under which head this case most properly came, but he added, that if he were forced to decide the point, he should prefer to place the cause under the first head.

Important consequences appear to follow from this decision. There seems to be no good reason why the principle here applied to blunders in a valuation, should not be equally applicable to blunders in a plan, or specifications, or bills of quantities. In that case, the contractor, now without remedy for such blunders against the employer, may find one against the engineer or architect. The practical effect of that will be that, save in the matters of granting certificates, &c., where the professional man is a quasi-arbitrator, he will be personally liable to the contractor for not merely wilful misconduct and false representation, but also for gross negligence.

Liability of Quantity Surveyor.—That in the case of bills of quantities, supplied by the surveyor as agent of the employer, nothing short of fraudulent misrepresentation will render the quantity surveyor liable for blunders in them, would appear from the case of *Priestley and Gurney v. Stone*, which was decided shortly before *Cann v. Willson*, and which went to the Court of Appeal.

Building
News, 3rd
August, 1888.

In *Priestley and Gurney v. Stone*, the plaintiffs were builders, and the defendant a quantity surveyor. The particulars of the case are as follows :—

The plaintiffs tendered for certain buildings on bills of quantities prepared by Stone on the condition that, if successful, they should pay for the quantities out of the first instalment paid them by the proprietors. The plaintiffs' tender was accepted, and they then proceeded with the works. On the defendant, Stone, applying for payment of his fees, the plaintiffs declined to pay, on the ground that the quantities were inaccurate, and that the defendant was responsible to them for the loss caused to them by his want of skill and care in preparing the bills of quantities.

Times Law
Reports, 30th
July, 1888.

The plaintiffs then brought an action against the defendant surveyor, and the latter counterclaimed for the amount of his commission.

At the trial, before Mr. Justice Stephen without a jury, the learned judge stopped the case, non-suiting the plaintiffs, and gave judgment for the defendant on the counterclaim.

The case then came into the Court of Appeal, but the Court (Lord Esher, M. R., Lindley and Bowen, L. JJ.) dismissed the plaintiffs' appeal with costs, affirming the judgment of Mr. Justice Stephen.

The substance of Lord Esher's judgment is as follows, and is most important as settling the question of liability of quantity surveyors to builders, with respect to bills of quantities supplied by them.

"The custom of supplying quantity surveyors had been in existence sixty years, and hitherto no single case had been brought by a builder to fix the responsibility upon the quantity surveyor for accuracy, which was sufficiently strong to show what the custom was. The contract as to taking out the quantities was not made between the quantity surveyor and the builder. The surveyor had no control over the way in which the quantities might afterwards be used, and had no knowledge of the persons to whom they might be submitted. As a fact, the quantity surveyor did not know that his quantities would be used by anybody. They did not, therefore, amount to a representation that they were true in fact, and no action for false representation apart from fraud could be based upon their alleged deficiencies. If deficiencies in the quantities were fraudulently made, it was possible the builders would have cause of action, but their case at the trial was not put on any such ground of fraudulent or even reckless statement. No evidence as to reckless misrepresentation had been given before the judge. For all these reasons, such an action as this had never been maintained, and hardly ever proposed. This was an attempt to manufacture a new case, in which, out of a hundred actions, not one would stand, and it was one which the Court would not sanction." Lords Justices Lindley and Bowen concurred, and the appeal of the builders was dismissed with costs.

See p. 67.

It would seem, from the judgment, that in this case the quantity surveyor, though paid by the builder, was not employed by him, the quantities being sent by the architect to intending contractors, with the plans, &c. The principle of it, therefore, would not, it is submitted, apply in the ordinary case where the surveyor himself sends the quantities to builders intending to tender for the work, with an intimation that if used the usual commission will be charged. Here there is a contract between the builder using the quantities and the surveyor, and accordingly the latter is in the same position towards the builder as the engineer is towards the employer, *i. e.*, in the position of a skilled servant, and therefore liable for want of reasonable skill or care.

Joining Engineer and Employer as Defendants.—In this connection it may be well to mention that where the contractor is in doubt as to whether the engineer or the employer is liable, or whether they are jointly liable, he is entitled, under the Supreme Court Rules, Order XVI. rr. 4, 7, to join them as defendants in the action.

L. R. 2 Ex.
D. 301.
(1877)

In the case of *The Honduras Inter-Oceanic Railway Company v. Tucker*, the plaintiffs claimed against L. and T., and alleged that L. through T., who professed to be, and in fact was, the agent of L., had contracted to take a certain number of debentures in the plaintiff company, which contract L. had failed to perform, and that L. had denied that T. was authorized by him to make the contract.

The plaintiffs prayed for specific performance of the contract or for damages against L., or in the alternative, if it should appear that T. had no authority to act as L.'s agent, then for specific performance and damages against T. T. applied to have judgment entered up in his favour, or to have his name struck out as defendant.

Held, affirming the decision of the Exchequer Division, that, under the circumstances stated in the claim, the plaintiffs were entitled to join L. and T. as defendants, and to obtain alternative relief against them under Order XVI. rr. 4, 7.

Where the engineer or architect is sued solely by the contractor, and he is advised that he is entitled to an

indemnity from the employer, he can, by serving the employer with a third party notice, obtain the benefit of the procedure laid down in Order XVI. Part IV.

III. LIABILITY TO THE EMPLOYER.

As has been already stated, the professional man stands in a different legal relation to the employer from that which he occupies with regard to the public and the contractor. He is the employer's servant, and in discharging his duties he must display a reasonable degree of skill and care, as has been pointed out at some length in a preceding chapter. If he fail to display that reasonable skill and care, and damage in consequence is suffered by his employer, he will be responsible for that damage. See Chap. II.

Negligence.—Whenever the engineer or architect fails in the proper discharge of his duty he will be liable to his employer, unless he can show that the failure has been due to causes outside or beyond his control. He will be liable for ignorance or want of skill. He will also be responsible if, though possessing reasonable skill, he neglects to discharge his duty properly; and if he stands by and allows his employer to be injured by the fraud or negligence of contractors, without giving him notice of such default, he will presumably be liable for his neglect.

In *Jones v. Bird*, Bayley, J., observed, "It is not enough that the defendants have acted *bonâ fide* and to the best of their skill and judgment: they are bound to conduct themselves in a skilful manner; and the question was most properly left to the jury to say whether the defendants had done all that any skilful person could reasonably be required to do in such a case." 5 B. & A. 845. (1822)

This expression of opinion was referred to by Blackburn, J., in delivering the opinion of the judges in *Mersey Docks v. Gibbs*.

L. R. 1 H. L.
C. 113.
(1864)

Want of skill or negligence may arise in a number of

ways. There may be mistakes in design, or the employment of improper materials in works under construction. There may also be the neglect of proper supervision, in consequence of which the employer does not get as good a building as he contracted for. Again, liability may be incurred by giving unsound advice upon matters submitted to the engineer or architect for his opinion.

Fortunately, however, for the honour and credit of the professions under discussion, there are very few cases on record in which negligence has been established against the members of those professions.

Engineers and architects, the latter perhaps more frequently, are often charged with under-estimating the cost of their work. That the ultimate actual cost of many works does often exceed the amount of the estimate is no doubt true; but the client is more frequently to blame for this than his professional adviser. Many persons can only form an opinion of a thing when they see it, and this holds true of buildings. The employer only gets a definite idea of his house when it is approaching completion. Then he orders numberless changes and alterations. These are carried out and charged for as extras, and the client at the wind-up grumbles at the architect, because the contract sum has been exceeded.

Then there are matters that cannot be foreseen. The site of a foundation turns out bad, and deeper sinking and additional concrete become necessary. The architect is then blamed because he had not designed his foundation to meet all possible conditions.

At the same time, mistake on the part of the engineer or architect in estimating the cost of a work, may render him liable to the charge of want of skill, if it appear that the error was due to the neglect of proper investigation or inquiry; but it would be otherwise if the mistake was in

consequence of difficulties that could not be foreseen by the exercise of reasonable forethought.

Thus, in the case of *Money Penny v. Hartland*, already quoted, the plaintiff had been employed to prepare an estimate and other particulars for the committee who were concerned in the erection of a bridge and approaches. He relied on the borings taken by a surveyor who had been previously employed by the committee, and did not take means to ascertain for himself the character of the ground forming the site of the intended works. The plaintiff in suing for his fees failed to recover, and it was held, *inter alia*, that he should have made all necessary tests for himself. 2 C. & P. 378. (1826)

This case seems to have been decided on the principle that the services rendered by the plaintiff to his employers being of no value to them, owing to his neglect of proper precaution and care, he was not entitled to recover remuneration for such services. Whether, however, the committee would have succeeded in an action against the engineer for want of skill and care, is a matter of difficulty. Quite possibly they could not have satisfied a jury that they had suffered any appreciable damage. Want of skill on the part of the professional man may render his services of no value to his client, and prove an effectual bar to his recovery of fees; and at the same time, the want of skill may not be of such an extreme character as to support a claim for damages at the suit of the client.

In this connection it may be well to cite the case of *Hall v. Burke*, which was recently decided by the Court of Appeal. Though the subject in discussion there was machinery for sawing marble, the principle on which it was decided would apply equally to plans for carrying out works. Times Reports, 4th December, 1886.

There the plaintiff, an engineer, undertook to provide for a certain price machinery which would saw marble into small pieces for mosaic work. During the making of the machinery, defendant suggested various alterations, which plaintiff adopted. Two machines embodying these alterations were made, and one was sent to defendant's workshop in Paris, and the other to his London yard. Both broke down, the Paris one shortly after it was first worked, and the London after about two months' work. Defendant there-

upon refused to pay for either machine, and plaintiff sued him for the contract price. Plaintiff alleged that the breakdown was due to alterations suggested by defendant, and to improper working of the machines. Defendant contended that he was entitled to reject the machines, as plaintiff was bound to supply machines that would do the work for which they were ordered. On trial, Grantham, J., gave judgment for plaintiff. Defendant appealed.

In delivering the judgment of the Court of Appeal, Lord Esher, M. R., said as follows:—"There were two well known kinds of contracts—first, a customer might ask a manufacturer to make a machine according to a given plan, or according to a plan supplied by the customer, in that case the manufacturer would only have to make the machine according to the plan, and in a workmanlike manner; secondly, a customer might ask the manufacturer to make a machine for a particular purpose, not supplying any plan, but leaving it to him to make it for that purpose; in that case, unless the contrary was expressly stated in the contract, the manufacturer would have to make a machine fit for that purpose. There might be a third kind of contract, where both parties said that they would jointly endeavour to make a machine that would do its business, when he thought that there would be no warranty that it would effect its purpose. Here there was a contract by the plaintiff to make the machine, not according to a given plan, but for sawing stone or marble. There was, therefore, a guarantee that it would be fit for that purpose, and this, notwithstanding that the manufacturer had never made a machine like it before. After the contract was made, the defendant ordered certain alterations, and it was argued that those alterations caused the breakdown. But where the manufacturer was to make a machine fit for a particular purpose, and it was left to his skill to make it, even though the customer ordered alterations, the manufacturer had a right to refuse to make those alterations, as he was responsible for the machine under the contract. If the customer then insisted upon them, the contract would be altered, and the machine would be made according to a given plan. But if, on the alterations being suggested, the manufacturer adopted them, he could not at the same time say that the contract was altered."

In conclusion, his lordship held that the machines were unfit for the purpose; that defendant was entitled to reject them; that he was entitled previously to take a time for testing them, but that the time taken with regard to the London machine was too long. Judgment for defendant as regards Paris machine, for plaintiff as regards London one.

the Harbour Commissioners of F., and their harbour master S., for damage caused to the ship by reason of her grounding upon her anchor, in consequence of the execution of certain orders given by S., the harbour master. It appeared that the ship had to be beached in the inner harbour of F., and S. came on board. When the ship came near the place where she was to be beached, S. gave orders as to lowering the anchor. The R. then overran her anchor and then grounded upon it, sustaining the damage complained of. The ship grounded, and the orders of S. were given, outside the jurisdiction of the harbour commissioners.

In the Probate Division it was held that the duties of S. comprised directions as to the beaching and mooring of vessels; that by giving directions when he went on board S. had resumed his functions as harbour master; that there was in fact negligence on the part of S., and that S. and the commissioners were liable.

The case then went to the Court of Appeal, when the decision of Sir James Hannen was affirmed. L. R. 10 P. D. 131. (1885)

The same rule as to liability for negligence was affirmed in the case of *The United Service*, where the master of a tug-steamer undertook to tow a fishing smack out of Great Yarmouth, subject to the condition that the owners of the tug should not be liable for damages arising from the negligence or default of themselves or their servants after the towage has been in part performed. The master of the tug afterwards took in tow six other vessels, in addition to the fishing smack, with the result that he could not control the movements of the fishing smack and keep her in her course, and in consequence of this she went aground and was lost. It was held by the Court that the smack was lost through the negligence of the tug-master, but that the owners were protected from liability by the terms of the towage contract. L. R. 8 P. D. 86; 9 P. D. 3. (1883)

In *Whiteman v. Hawkins*, negligence was charged against a solicitor, and the particulars were as follows: The plaintiff, having advanced a certain sum of money by way of mortgage on certain lands, agreed to make a further advance to the mortgagor, the latter having in the meantime acquired an additional parcel of land, which was to be added to the former security. The defendant acted as solicitor to the plaintiff in the transaction and omitted to ascertain (as the fact was) that a third party had an equitable charge to the extent of 46*l.* upon this additional land. As a consequence of this the plaintiff on selling the land was unable to convey without paying the 46*l.* Held that this was negligence for which the defendant solicitor was liable, and in the absence of evidence to reduce the amount the 46*l.* so paid was the proper measure of damages. L. R. 4 C. P. D. 13. (1878)

Times, 19th
February,
1878.

In the case of *Ellissen v. Lawrie*, which was tried before Mr. Justice Hawkins and a common jury, the plaintiff was owner of a dwelling-house. He employed the defendant, an architect, to design and superintend the construction of certain works of drainage in connection with his house. The defendant prepared the necessary drawings and specifications, and the execution of the works was placed in the hands of a contractor. The work, however, was done in an improper manner. Foul gases were alleged to escape into the house from the drains. Several members of the plaintiff's family were attacked with ulcerated sore throat. A new contractor had to be called in to repair the defective drains, and it was found, amongst other matters, that junctions had been formed by sticking the end of one pipe into another. The plaintiff now sued the defendant architect for the cost of the repairs and the medical expenses, on the ground that those were due to negligence of the defendant in not properly superintending the works.

The jury found a verdict for the plaintiff, and a barrister and surveyor were appointed to assess the damages.

Building
News, 18th
May, 1888.

In *Corbett v. Richmond and Chandler*, a case tried at Manchester Assizes, February, 1888, the plaintiff was an architect, and sued the defendants for balance of his commission in connection with the erection of certain premises in Manchester. In their defence, the defendants alleged negligence on the part of the plaintiff in taking out quantities and in the measuring up of the works, with the result that certificates had been granted to the contractors for some 537*l.* in excess of what was properly due by the defendants to such contractors.

Mr. Justice Cave referred the case for inquiry and report to Mr. Ridley, one of the official referees. The hearing lasted five days, when the referee, in giving the reasons for his proposed report, said: "The first allegation against the plaintiff architect was a general one—that he did not do their work properly. He did not think there was any testimony at all in support of that statement. The only two questions that remained were, (1) whether the plaintiff, in taking out the measurements, and (2) in assessing the prices which were due to the contractors, was guilty of negligence. What did the measurements come to? Three-quarters per cent. was not a large difference between the plaintiff and the defendants in works amounting to 10,000*l.* With only such a difference it was absolute nonsense to charge an architect with negligence. As to the prices, the weight of evidence was that they were fair and reasonable. The onus of proof of negligence lay upon the defendants, and they had totally failed to discharge that onus. Further, he had never known a case in which negli-

gence had been charged against a professional man on such insufficient grounds. He should therefore report to the judge in favour of the plaintiff and against the counter-claim."

In *Crabb and others v. Brinsley*, the defendant was a surveyor, and the action was brought against him to recover damages due to his negligence. The trial was taken before Denman, J., and a jury. The plaintiffs alleged that the defendant gave them bad advice in connection with certain advances by way of mortgage upon premises near Holborn. Building
News, 2nd
November,
1888.
5 T. L. R. 14.

In 1882, the plaintiffs were applied to by one Tattersall for a loan on certain premises in which he had a leasehold interest. The plaintiffs retained the defendant as their surveyor to advise on the subject of the loan, and he accepted the retainer. The defendant reported that the premises were a good security for 2,000*l*. On the faith of this report, the plaintiffs advanced Tattersall 1,500*l*. on mortgage of the premises. So far from the defendant's report being accurate, the premises were afterwards sold for 410*l*. The plaintiffs claimed 1,735*l*. for principal, interest, and expenses. There was a second action by one of the plaintiffs against the same defendant in respect of a further advance on the same premises of 1,500*l*. The cases were consolidated.

Denman, J., observed to the jury that the first question to be decided by the jury was, Had the defendant been retained by the plaintiffs? He had certainly been employed by Tattersall. Sometimes the same surveyor acted for both parties, which was not a wise course. If he was retained by the plaintiffs, Was he guilty of negligence in advising them as to the first advance, and as to the second advance? It was alleged the defendant had been guilty of negligence in not making himself properly acquainted with certain particulars and defects attaching to the premises. As matters turned out, the sums advanced were very large. Again, Had the plaintiffs been induced by the advice of the defendant to advance the sums in question?

The jury found that the defendant had been retained by the plaintiffs, but that he had only been negligent in advising the second advance of 1,500*l*. Judgment for the plaintiffs in the second action, with 1,500*l*. damages; and judgment for the defendant surveyor in the first action.

In the case of *Miller v. Wilson*, tried before Cave, J., and a common jury, the plaintiff sued the defendant, an architect, for damages in consequence of his negligence in carrying out certain alterations of the plaintiff's house. During the progress of the works both architect and builder were dismissed. The negligence Building
News, 6th
August, 1886.

charged was that the defendant advised the acceptance of tenders for works which were the highest of those sent in. A good deal of conflicting evidence was given on both sides, and eventually the jury found for the defendant.

7 Bing. 569.
(1831)

In *Hill v. Featherstone*, it was held that an attorney was not entitled to recover fees when, through ignorance or inadvertence, he had advised the client to take steps altogether unnecessary. In delivering judgment, Alderson, J., said, "If an operation, which might have been useful, has merely failed in the event, the surgeon is nevertheless entitled to charge; but if it could be useful in no event, he would have no claim on the patient."

Liability to Employers in cases of Difficulty.—A medical man or surgeon is not an insurer of results, and it is submitted that much stronger evidence would be required to establish a charge of negligence against a medical practitioner than would be necessary in the case of a civil engineer or architect. This will appear when it is considered how tentative in character is medical science. At the same time, the dictum in *Hill v. Featherstone* is very important, because if the thing proposed to be done, let it be a matter pertaining to medicine, engineering, or architecture, cannot succeed in any event, using the words of the learned judge, it should not be undertaken. Applying this, then, in a general way, if the engineer or architect, on being retained to carry out work of a doubtful character as to results, finds on due investigation that the outcome of his work will end in disappointment, he should refuse to proceed.

See *supra*.

It will follow, then, that in discussing the question of liability, the difficulty of the subject is materially increased when the position of the civil engineer or architect is considered in connection with the more experimental matters which frequently arise in actual professional practice. For example, an engineer designs a large railway embankment, and though he has made preliminary tests of the

ground, he finds the latter gives way under the superimposed load placed upon it.

Again, an engineer recommends a local board to obtain a supply of water by means of deep well sinking. The well is sunk at great expense, and the engineer's anticipations are not realized. No water is found, and the money is, practically speaking, thrown away. Or perhaps the scheme is one for dealing with the sewage of a district. After full inquiry the engineer proposes a certain method of treating the sewage. This is adopted, and, as has happened in very many cases, the results are disappointing to all parties concerned. Then there is the matter of electric lighting, as well as many others, with respect to which professional men are to a large extent merely groping their way. Now in all such branches of practice, the question is of great importance—To what extent, if at all, is the professional adviser liable to his employers when the results are unsatisfactory? As is to be expected, there are not many cases which can be referred to as authorities, so that the question must be looked at from the point of view of principle rather than authority.

From the case of *Chapman v. Walton* it would appear that in an inquiry whether an architect had exercised reasonable skill in the discharge of the duty undertaken by him, it would be a good answer to the charge of negligence if it could be shown by evidence that a majority, or even a moiety, of a given number of experienced men in the same profession would have acted in the same manner as the person whose conduct was under discussion.

10 Bing. 63;
3 M. & Scott,
389. (1833)

It is submitted that this mode of determining the question of negligence on the part of civil engineers or architects would be specially applicable to cases where the professional practice had not been generally well settled; and when it was a matter in which a variety of opinions existed as to the best method to be adopted to secure a satisfactory result.

There can, however, be no doubt that in undertaking work of an experimental or hazardous character, professional men should protect themselves by express provisions in the agreement with their employers. A little precaution at the outset would save much trouble and possibly prevent litigation. It will, of course, largely depend upon the circumstances of each case what form of provision should be inserted in agreements relating to work of an uncertain character. But it should be made quite clear that the civil engineer or architect is only responsible to do the best he can to secure a satisfactory result, but if, in spite of all his knowledge and skill, there is a failure, the responsibility for the failure will lie with the employer.

Thus a railway company, to save expense, direct their engineer to make a number of bridges of timber, and if the engineer carry this direction into effect without expressly protecting himself, he may find in a few years that the heavy annual charges for renewals and repairs are laid at his door. His reputation may be injured, even if no actual charge of want of skill is made against him. In such a case he should put it on record that the course adopted was against his express advice, and was for the purpose of keeping down the first cost.

Again, a building committee instruct their architect to use a particular local stone in a church proposed to be erected. The architect, being a stranger in the locality, knows nothing of the stone in question. He makes inquiries, which do not however satisfy him as to the durability of the stone. If now he carries out the direction of the committee, and the stone turns out unsuitable for the purpose to which it is applied, he will probably be open to the charge of want of skill. In such circumstances a jury would possibly come to the conclusion that the architect should have warned his employers of the serious risk they

were running in adopting the particular kind of stone for their church. In such a case the only safe course for the architect is to give express advice against the use of the doubtful material, and point out at the same time that the responsibility for possible failure must rest with the committee and not with him.

CHAPTER V.

RIGHT TO SUPPORT, LIGHT, AND AIR.

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User of Property.—As engineers and architects, in their capacity of agents for their employers, have the conduct of many operations involving the exercise of rights of ownership of lands and buildings, it is necessary that they should not by themselves, or contractors acting under them, do any act likely to interfere with the rights of other parties. The well-known legal maxim should be always borne in mind—“*Sic utere tuo ut alienum non lēdas*,”—i.e., the owner of property must so use it as not to injure the property of his neighbour.

Many persons assume that they may do what they like with their own, but this general right is subject to very important limitations. A person may be owner in fee-simple of a plot of land, and thus have the greatest possible estate known to the law, but still his power of dealing with the land is not absolute. Hence it is necessary that those professional men whose duty it is to advise their employers as to the best means of developing and using

their property, should not recommend any course that will entail interference with the rights of other parties and possible litigation.

Thus the carrying out of a particular kind of foundation to an intended building may result in damage to the site or structure of an adjoining building, or the alteration of an old house may cause damage to another house alongside it. Again, a new building may sink after it has been completed and crack a building next door. In all these cases the owner or occupier of the building which has been damaged will seek compensation, and whether he succeeds or not in establishing a legal right to such compensation, the result to the engineer or architect is a great deal of worry and loss of time.

Engineers and architects are not lawyers, and not expected to possess extensive legal knowledge; but at the same time it is desirable that they should know enough to prevent them entering upon any course of proceeding that will in all probability involve their client in litigation and expense; and we therefore think it may be useful to give here a sketch of the law with regard to those easements with which engineers and architects are most often concerned, namely, rights of support, and rights to light and air.

Support of Land by Land.—The law relating to the support of one plot of land afforded by the land adjoining may be put very shortly. The owner of one plot of land is entitled to have his land supported by the land adjoining. He has this—*ex jure naturæ*—as a right of property, and not by way of acquired easement. Any act done by the owner of the adjoining land which deprives him of this support is wrongful. The owner of the land injured by the deprivation of the necessary support will be entitled

to claim damages from the wrong-doer, or, in the case of a very serious character, he may restrain the wrong-doer by injunction.

And in the same way, where the surface belongs to one person and the minerals in the same plot belong to another, the owner of the surface is entitled to have it supported at its ancient level.

Thus, if my neighbour makes a deep excavation on his land close enough to the boundary between us as to cause a portion of my land to slip and fall into the excavation, I would be entitled to sue my neighbour for the interference with my right of support.

Hence, in designing foundations for an intended structure, the engineer or architect must bear in mind the rights of the owners of the land adjacent to the site of the works. Proper provisions should be made in the design that the excavation for the foundation can be carried out without causing injury to the adjoining land. And these provisions should be of such a character as will ensure a satisfactory result in the hands of a contractor or builder of ordinary experience and prudence.

If, however, the nature of the case is such that in the opinion of the engineer or architect the necessary excavation will inevitably cause more or less injury to the adjacent land, the client should be advised accordingly, and a proper arrangement come to with the adjoining owner. Such an arrangement is much more easily negotiated at the outset than after the damage has been done.

The law on this subject is well laid down in the case of

12 Q. B. 739.
(1850)

Humphries v. Brogden. That was a case, not of lateral, but of subjacent support, but the law relating to both kinds of support is precisely the same. The facts of that case were as follows:

The defendant owned the minerals under a certain plot of land, the plaintiff owning the surface. No evidence was produced as to how the ownership of the minerals and of the surface came into

different hands. The defendant, in working the minerals, let down the surface, to the injury of the plaintiff. On action brought, the jury found that the defendant had worked the mines carefully, and according to the custom of the country, but without leaving sufficient support for the surface. On this finding the Court held that the plaintiff was entitled to a verdict, and Lord Campbell, in delivering judgment, gave the following exposition of the law relating to the support of land by land: "The right to lateral support from adjoining soil is not like the support of one building upon another, supposed to be gained by grant, but is a right of property passing with the soil. If the owner of two adjoining closes conveys away one of them, the alienee, without any grant for that purpose, is entitled to the lateral support of the other close the very instant the conveyance is executed. *Pari ratione*, when there are separate freeholds, from the surface of the land and the minerals belonging to different owners, we are of opinion that the owner of the surface, while unencumbered by buildings and in its natural state, is entitled to have it supported by the subjacent natural strata. Those strata may, of course, be removed by the owner of them, so that a sufficient support for the surface is left; but if the surface subsides, and is injured by the removal of these strata, although, on the supposition that the surface and the minerals belong to the same owner, the operation may not have been conducted negligently nor contrary to the custom of the country, the owner of the surface may maintain an action against the owner of the minerals for the damage sustained by the subsidence. . . . We likewise think that the rule giving the right of support to the surface upon the minerals, in the absence of any express grant, reservation, or covenant, must be laid down generally, without reference to the nature of the strata, or the difficulty of propping up the surface, or the comparative value of the surface and the minerals."

It is to be observed that an owner is only entitled to have his land supported by the adjoining land, and the subjacent minerals, in its natural state. Now land ceases to be in its natural state either by having the minerals taken from below it, or by having buildings erected upon it. Accordingly if in either of these cases the operations of another owner let down the surface, it will be a sufficient defence, in the absence of an acquired right of support, if he can show that had the ground been in a

natural state no injury would have resulted. This will appear from the following cases.

3 M. & W.
220. (1838)

Partridge v. Scott was as follows: The plaintiff excavated the minerals under his land, and then built a house upon it which, owing to his own excavation, needed support from the defendant's land. The defendant afterwards excavated his land so near the border that the plaintiff's land sank, and his house was injured. Held that, in the absence of an express or implied grant of support to house and surface, no action lay.

L. R. 6 Ch. D.
284. (1877)

A more important and specific case is that of *Corporation of Birmingham v. Allen*. There the plaintiff and defendant were owners of plots of land which were separated from each other by an intervening strip. This strip had been undermined by the removal of the subjacent minerals. The defendant removed the minerals from his land, with the result that the plaintiff's land sank. It was admitted that if the intervening slip had not been undermined the plaintiff's land would not have been injured. Held, that no action lay. The Master of the Rolls (Jessel), in delivering judgment, thus defined the amount of support to which a landowner was entitled: "That support to which a landowner is entitled from the adjacent land is confined to such an extent of adjacent land as in its natural undisturbed state was sufficient to afford the requisite support." Of course in this case if the injury to plaintiff's property had arisen through his own land being excavated, he should have had still less ground for complaint as against the defendant.

It is to be observed that though the owner of land is entitled to the support of underlying strata, he is not entitled to the support of subterranean water, and that the adjacent owner may drain his lands, although the consequence may be to let down his neighbour's surface. That was decided in the case of

L. R. 4 Ex.
248. (1869)

Popplewell v. Hodgkinson. This was a strong case, since both plaintiff and defendant held from same grantor, and under leases containing covenants to build. Plaintiff owner of one close built several cottages upon it. Defendant afterwards leased neighbouring land from same lessor and drained it, a result of which was the sinking of the plaintiff's surface, with consequent injury to the cottages. Held, that plaintiff had no right at common law to the

support of the subterranean water, and its removal by draining was not an act in derogation of the original lessor's grant.

A very important limit has been placed on the general rule, that the owner of land is entitled to the lateral support of his neighbour's land. This was laid down in

Smith v. Thackeragh, where it was determined that the right of an owner of land to the lateral support of his neighbour's land is not an absolute right, and the infringement of it is not a cause of action without appreciable damage. Therefore, where A. dug a well near B.'s land which sank in consequence, and a building erected on it within twenty years fell, and it was proved that if the building had not been on B.'s land, the land would still have sunk, but the damage to B. would have been inappreciable: Held, that B. had no cause of action against A. L. R. 1 C. P. 564. (1868)

In this case there was a building on land of the plaintiff, but it cannot be regarded as having anything to do with the decision: because the jury found, as a matter of fact, that the land would have sunk even without the building. But the existence of building on the plaintiff's land will not necessarily defeat his claim unless the defendant can show that the plaintiff has overloaded his land and thus contributed to the subsidence.

Support of buildings by land.—The inherent right of a landowner to have his land supported laterally by the adjacent land, and vertically—if the minerals under it belong to another—by the subjacent strata does not extend to buildings erected upon the land. Rights of support for buildings, in the words of Alderson, B., “If they can be established at all must, we think, have their origin in grant. If a man builds his house at the extremity of his land, he does not thereby acquire any right of easement, for support or otherwise, over the land of his neighbour. He has no right to load his own soil so as to make it require the support of that of his neighbour, unless he has some grant to that effect.”

The grant, however, need not be express; the right may be acquired equally well by an implied grant; and a grant of the right may be implied, either from the circumstances

surrounding the grant of the land itself, or from the long uninterrupted exercise and enjoyment of the right.

A grant of the right of support to buildings implied from the circumstances surrounding the grant or lease of the ground itself, most frequently arises in the case of building leases.

See *infra*.

The law as stated by Grove, J., *Siddons v. Short*, is, "As to the buildings, the inclination of my opinion is that the cases upon the subject go to this, that, where a man parts with land knowing that substantial buildings are intended to be erected upon it, he impliedly engages so to use his adjoining land as not to injure or interfere with those buildings."

The same rule applies, when the grantor lets on a building lease the surface of the land reserving to himself the minerals under it. Here, unless in the lease there is an express covenant to the contrary, he is bound to work the minerals in such a way as not to injure the buildings erected on the surface.

The implied grant here arises from the well-known doctrine that no one can derogate from his own grant. If A. grants part of his land to B. for building purposes, he will not be permitted to use the rest of his land so as to prevent B. from using his land for the purpose for which it was granted. And as appears from Mr. Justice Grove's words it is not necessary that the lease should be expressly declared to be for that purpose, provided the lessor well knew that it was intended that the land should be so used. As, however, the implied grant is based on the doctrine already stated, it is good only as against the original grantor and those claiming under him. If A. let land to B. for building purposes that does not give B.'s buildings any right of support from C.'s land, if C. does not hold his land from A., or holds it by a lease granted prior to B.'s. A few cases will make this clear.

L. R. 2 C. P. D. 572. (1877) In *Siddons v. Short and others*, already referred to, A. sold land to B. for the purpose of an iron foundry. Adjoining the land so sold

to B., A. had other land, under which there was a deposit of coal. A. afterwards leased the minerals to C., who began working the coal within such a distance from the land of B. as to be reasonably calculated to endanger the stability of the foundry. Held, to be good ground for an injunction against A. and C., even though no actual damage had been sustained as yet by B.

Again, in *Rigby v. Bennett*, both plaintiff and defendant took grants of adjacent plots of land from the Corporation of Liverpool for building purposes. Both were bound to build according to plans to be approved of by the corporation. The plaintiff, who made his agreement for a lease in July, 1868, submitted plans showing his foundation as 10 feet, 9 inches deep. As a matter of fact, however, he put in the foundation only 8 feet, 3 inches deep, as the sub-soil was unfavourable. This was done to the knowledge of the corporation, whose officers inspected the works and made no objections.

L.R. 21 Ch.
D. 559.
(1882)

In August, 1869, the defendant made his agreement with the corporation for the site adjoining the plaintiff's house, then in course of erection. The defendant, when he came to build in 1881, and wishing to make his foundation deeper than that of the plaintiff, excavated his own site to such an extent as to endanger the plaintiff's building.

On appeal from the Vice-Chancellor of Lancaster, held, that the plaintiff was entitled to restrain the defendant from excavating so as to let down the plaintiff's house; for that there was not enough in the special circumstances of the case to take away the right of support from the adjoining lands of the grantor, which is implied in a grant of land for the purposes of building.

In delivering judgment, Jessel, M. R., said: "If the corporation had granted a lease of land on which a house was to be built, and it was built in a reasonable manner, it appears to me impossible to say that they could afterwards be entitled to let the land down by dealing with the adjacent land belonging to them. If, again, they granted the house to the plaintiff as it then stood, or granted the land on which the house was standing, they granted with it, if I may say so, the easement or the implied obligation or warranty that the house should not be let down by anything done on the adjoining land."

An exception to the rule that when land is purchased for a particular object known to the vendor, the vendor will not be allowed to derogate from his own grant by so using his own property as to render impossible the accom-

plishment of those purposes, occurs in the case of purchases by railway companies under sects. 77, 78, 79 of the Railways Clauses Consolidation Act, 1845. In purchases under that Act, railway companies only obtain the surface of the land, the minerals remaining the property of the vendor, who may, after having given due notice to the company, and the company refusing or neglecting to give compensation to the vendor for the minerals, work them up to and under the railway, provided only he work them in a "proper manner" and "according to the usual manner of working such minerals in the district." This arises from the fact that the relative rights of the vendor and company are not regulated by the ordinary law, but solely by the statute before mentioned. (*Great Western Railway Company v. Bennett.*)

L. R. 2 H.
L. 27.
(1867)

As has been said a grant of the right of support of buildings by land may be implied by the long and uninterrupted enjoyment of that right.

The law on this point has been definitely settled by the House of Lords in the modern case of *Dalton v. Angus*.

L. R. 6 App.
Cas. 740 ;
50 L. J. Q. B.
689 ; 44 L. T.
844. (1881)

It was decided that a right to lateral support from adjoining land may be acquired by twenty years uninterrupted enjoyment for a building proved to have been newly built or altered, so as to increase the lateral pressure at the beginning of the period, and the enjoyment being peaceable and open.

The facts of the case are as follows :—Two dwelling-houses, belonging to the plaintiff and defendant respectively, stood side by side, and each received support from the site of the other. In 1849 the plaintiff's house was gutted of internal walls and turned into a factory, and beams were inserted into a chimney stack which had support from the soil under the defendant's house. The pressure of the plaintiff's house on the site of the defendant's house was thus considerably increased and the alteration was made openly. Matters thus continued in this state for a period of upwards of twenty years, when the defendant pulled down his house for the purpose of rebuilding, and employed a contractor for that purpose. No negligence was proved on the part of the contractor; but the result of

the excavations was that the chimney stack fell through, being deprived of the support of the soil forming the site of the defendant's house. A considerable part of the plaintiff's factory came down with the chimney stack.

On these facts the House of Lords held that the plaintiff had acquired a right of support for the altered building by the twenty years enjoyment, and that he could sue the owner of the adjoining house and the contractor in respect of the injury caused by their operations.

On the hearing of this case all the authorities were fully considered, and the report will amply repay a careful perusal.

Support of Buildings by Buildings.—The law applicable to the support of buildings by land applies to the support of buildings by buildings. That was decided in the case of

Lemaitre v. Davis, where it was held, on the authority of *Dalton v. Angus*, that when ancient buildings belonging to different owners adjoin each other there is a right of support from the building as well as from the land. "Having," said Hall, V.-C., in delivering judgment, "that case (*Dalton v. Angus*) to guide me, and seeing no distinction drawn between the two rights of support from land and from a building, I consider the law to be as applicable to support from an adjoining building as it is to support from land. And I take the same view as regards this right as that adopted by the Lord Chancellor and by some of the most eminent judges, viz. : that it is a right within the scope and provisions of, and is claimable under, the Prescription Act (2 & 3 Will. 4, c. 71), s. 2."

19 Ch. D. 281;
46 L. T. 407;
51 L. J. Ch.
173. (1881)

See *supra*.

Limitation of Actions for interference with Rights of Support.—The period of limitation runs not from the time at which the act is done which results in the interference with the right of support, but from the time the resulting mischief begins. This was decided in

Backhouse v. Bonomi. There plaintiff owned the surface of a piece of land and defendant the underlying minerals. Defendant in removing the minerals left sufficient pillars to support the surface, but afterwards, by his operations on other adjacent lands, produced what is called a thrust which let down the plaintiff's surface. It was more than six years since the subjacent minerals was removed,

9 H. of L.
Cas. 503.
(1861)

but less since the surface began to go down. The question was whether the plaintiff's claim was barred by the Statutes of Limitation. Held, that it was not. Lord Cranworth said, "It has been supposed that the right of the party whose land is interfered with is a right to what is called the pillars or the support. In truth his right is a right to the ordinary enjoyment of his land, and till that ordinary enjoyment is interfered with, he has nothing of which to complain."

Liability of Owners and Contractors.—It often becomes a question whether the owner and contractor, or the contractor only, is liable for injury to an existing structure, by reason of the building operations carried on upon the land adjoining. The law on this part of the subject may be very shortly stated.

When the owner places the work, which is lawful in itself, and which, if carried on without negligence, does not involve injury to the adjoining buildings, in the hands of a competent contractor, and divests himself of all control of the workmen and the building operations, the liability for any injury caused will lie upon the contractor. The owner does not, in fact, render himself responsible for the negligence of the contractor or his workmen.

7 Q. B. Rep.
960. (1845)

This view was adopted in *Allen v. Hayward*, where the contractor had been employed by navigation commissioners to carry out certain works lawful in themselves. In the course of his operations, he improperly, and without authority, introduced water into a drain which had been insufficiently made by himself. The result was that the plaintiff's lands were flooded. It was held, that the contractor, and not the commissioners, were liable to the plaintiff.

But where the work to be done, though lawful in itself, is likely in the course of execution to cause injury to adjoining premises unless proper precautions are adapted by the contractor; then, on his failure to adopt sufficient precautions, the proprietor (as well as the contractor) will be liable for the injury caused to the adjoining buildings.

Thus, in *Hughes v. Percival*, the plaintiff and defendant were owners of two adjoining houses which were separated by a party wall, the property of both. The defendant's house also adjoined B.'s house, and between them was a party wall. The defendant employed a contractor to pull down his house, and to rebuild it on a plan which involved the connection of the new house with the party wall next plaintiff's house in such a way that if the new house fell it would pull over the party wall. During the course of the operations, the workmen, by certain negligent acts done without the knowledge or approval of the defendant, caused the new house to fall, with the result that the party wall next plaintiff's house was pulled over and the plaintiff's house injured.

L. R. 8 App.
Cas. 443.
(1883)

It was held that the defendant owner was liable for the injury; that the law cast a duty upon the defendant to see that reasonable care and skill were exercised in those operations which involved the use of the party wall belonging to himself and the plaintiff, exposing it to the risk above mentioned, and that the defendant could not get rid of responsibility by delegating the performance to a third person, and that he was therefore liable.

The same principle was adopted in the earlier case of *Bower v. Peate*. In this case the parties were owners of two adjoining houses, the plaintiff being entitled for his house to the support of the soil of the defendant's house. The defendant employed a contractor to pull down his house and re-build it, the contractor undertaking to support the plaintiff's house so far as might be necessary during the work, make good any damage which might be done, and satisfy all claims which might be made in respect of the same. It turned out, however, that the means taken by the contractor for the security of the plaintiff's house were inadequate, and it received injury.

L. R. 1
Q. B. D. 321;
45 L. J. Q. B.
446. (1876)

It was held that the defendant owner was liable, even if there had been an express undertaking by the contractor of the risk, and a stipulation—which there was not in this case—to do, as part of the works of the contract, all that was required to support the plaintiff's house.

The case of *Tarry v. Ashton* may also be referred to. The defendant was owner of a lamp which projected from his house over the footway. He had got the lamp repaired some time previously, but it appeared that this repair had not been done in a proper manner. On a certain occasion, a person employed by the defendant was cleaning the pipes which supplied the lamp, the ladder he was using slipped and caused the lamp to fall, and in its fall it injured the plaintiff who was passing. It turned out that the lamp would not have fallen but for its defective condition.

L. R. 1
Q. B. D. 314.
(1876)

Held, by the Divisional Court (Lush and Quain, JJ.), that it was no answer to the plaintiff's claim that the defendant had employed a competent person to repair the lamp; and by Blackburn, L. J., that it was the defendant's duty to keep the lamp in reasonable repair, and the person he had employed having failed to do so, defendant was liable for the consequence of the breach of duty.

In many contracts, provision is made that the contractor shall take all necessary precautions to prevent injury to adjoining property, and defend all legal proceedings which may be instituted in consequence of such injury. An owner, however, is generally considered a better mark for damages than a contractor, and it is generally against the owner that the action is brought, notwithstanding the terms of the contract. To meet this state of things, a clause is now generally inserted in building contracts, by which the contractor binds himself to answer and satisfy all claims, and by means of which the owner, when he is made defendant, can bring in the contractor as a co-defendant under the usual third party procedure, but it must be clear that the clause is by way of indemnity.

Some authorities consider it unfair to throw upon a contractor the risks attendant upon pulling down an old house, taking the liability of paying for the injury that may be caused to adjoining premises. But on the other hand, if the contractor and his workmen know that the employer is alone liable to the adjoining owner, they are less likely to take reasonable and proper precautions to avoid such injury.

The following case will serve as showing the application of the law as now stated to a different state of facts from those existing in the instances before quoted.

L. R. Ir. 20
C. L. 35.
(1888)

In *Green v. Belfast Street Tramway Company*, the defendant company owned a piece of vacant ground adjoining a house belonging to the plaintiff, but both took from a common grantor. On this

vacant ground, the defendant company piled a large quantity of paving setts, with the result that the plaintiff's house was cracked and otherwise injured. At the trial, it was alleged that the damage was caused by the disturbance of the ground under plaintiff's house by reason of the additional weight placed upon the adjacent ground by the defendant company. By the latter, it was alleged that the plaintiff's house had been cracked before by vibration due to railway trains which passed within a few yards of the house, and that the setts would have been quite harmless but for the shaking caused by the railway traffic. The jury, however, found for the plaintiff. On motion for a new trial, the case went to the Divisional Court, where it was held that notwithstanding that the vibration due to the railway traffic may have rendered the plaintiff's house more susceptible to damage from the piling of the square setts, still the plaintiff was entitled to support for his house from the defendant's land, and the motion for a new trial was refused.

Right to Light.—The architect has often, in the erection of buildings, to guard against interference with the light enjoyed by adjoining buildings. In some cases, also, he has to rebuild in such a way as to preserve the ancient lights which existed in the old building. It will, therefore, be of advantage that a short *resumé* be given of the law relating to ancient lights.

Acquisition of
the right to
light.

The right to light may be acquired in several ways: firstly, by express grant; secondly, by implied grant; and thirdly, by long enjoyment.

Express Grant.—The right to light, like any other easement, may be conferred by express grant; but, of course, such a grant would only bind the grantor and those deriving from him. Such grants do not frequently occur. *Davies v. Marshall* may be referred to as an illustration.

7 Jur. N. S.
720; 1 Dr. &
Sm. 557.
(1861)

The plaintiff was lessee in occupation of a house in a street off Piccadilly, but before the lease was granted, he had made a number of improvements, which included some new windows. The owner then made the demise of the premises with "all ancient lights, areas, and appurtenances." The lessee of the adjoining ground, who also held under the plaintiff's lessor, but by a lease of later

date, then proceeded to block up the new lights. Proceedings were then taken, and an injunction was granted, the Court (Kindersley, V.-C.) holding that the term "appurtenances" in the plaintiff's lease included the new windows, and that neither the lessor, nor any one deriving under him, could block up the lights so granted.

9 Bin. 305; 2
Moo. & S.
362; 2 L. J.
N. S. Com.
Pl. 11.
(1832)

Again, in *Swansborough v. Coventry*, the plaintiff purchased a house, and the defendant at the same time purchased the land adjoining. A one-storeyed building had previously stood on this land. The conveyance to the plaintiff included "all lights, easements, rights, privileges, and appurtenances to the same belonging," and in the same deed the adjoining land was described as building ground. It was held that the defendant could build to the extent of the former building, but could not obstruct the plaintiff's lights.

Implied Grant.—Rights to light very frequently arise by implied grant by vendors and lessors. Thus, when an owner sells a house with windows overlooking a piece of ground belonging to himself, he cannot afterwards, nor his successors *in statu*, build upon the adjoining ground so as to block up the windows. Again, when two adjoining tenements are sold at the same time, there will be the same implied obligation on each of the purchasers with respect to the lights of the other.

1 Price, 27.
(1814)

Thus, in *Compton v. Richards*, the plaintiff was the purchaser of a house, and the defendant was lessee of the adjoining house, which had been purchased by his lessor at the same time as the plaintiff's house. The two houses at the time of the sale were unfinished, but the bulk of the plaintiff's house had the window-spaces opened in them, and the plan exhibited at the sale had the windows shown upon it. It was held by the Court that the defendant took subject to an implied obligation not to obstruct the plaintiff's lights.

27 L. J. Ex.
286. (1858)

In *Greeve v. Harding* the plaintiff and defendant claimed under the same owner, Merrick. The plaintiff was lessee of two houses in Oxford Street adjoining the arcade, which leads to Bainbridge Street, and these houses received light from the arcade through one window, which was formed at the time the lease was made, there being other apertures in the walls, but whether intended for doors,

windows, or anything else not appearing distinctly either from their construction or the plans. Merrick had built the arcade under an agreement with the owners, and then got a lease of the premises, which contained the stipulation that the houses in Oxford Street were not to have lights or openings into the arcade except those already constructed. The defendant afterwards became assignee of this lease, and proceeded to block up the entrance to the arcade, and stopped up the apertures by which the plaintiff's houses received light from the arcade. It was held that the defendant was liable for obstructing the one window belonging to the plaintiff which was formed at the time the leases were granted, but not for obstructing the others which had been mere apertures at the time the lease was made.

In *Russell v. Watts* simultaneous leases were granted to A. of B., C., D., and E., contiguous plots of land, altogether forming a single block. In each lease there was a covenant to build houses according to a certain plan. A. sold C., D. and E., the conveyance reciting the original leases and covenants. Afterwards A. became bankrupt. Held, that the purchaser of the B. plot could not build in such a way as to obstruct the light of houses on C., D., or E. plots built according to the plans. 10 App. Cases, 690. (1886)

The case of *Beddington v. Altee* may be referred to as a case where, though two adjoining lessees held from the same lessor, one was held to have no right of light for his house over the land of the other. Here A. leased a house to B. Afterwards A. contracted to sell the neighbouring land to the defendant. Then he sold the house leased to B. to the plaintiff, subject to B.'s lease. Subsequently the land agreed to be sold to the defendant was conveyed to him, and after that the plaintiff obtained possession of the house leased to B. The defendant then obstructed the lights of plaintiff's house: Held, that since at the time of the sale of the house to the plaintiff, A. had contracted to sell the adjoining land to the defendant, the plaintiff could gain no easement over that land; and so no action lay against the defendant for obstructing the lights. 35 Ch. D. 317. (1887)

Sect. 6, sub-sect. 2, of Conveyancing Act, 1881, did not apply.

Long Enjoyment.—By far the greater number of cases of rights to light are the creations of the Prescription Act. By this Act the enjoyment of light for a period of twenty years confers an indefeasible title to such light. The words of the section are as follows:—

“And be it further enacted that where the access and use of

2 & 3 Will. 4,
c. 71, s. 3.

light to and for any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding; unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

It will be noticed that the right, as acquired by means of twenty years' enjoyment, is a right against all parties who interrupt the enjoyment, while the right conferred by grant is a right merely as against the grantor and his assigns.

The Nature of the Enjoyment.—The Act says that the light shall have been enjoyed with any dwelling-house, workshop, or other building, and it should be observed here that the expression includes a house that has been uninhabited for a considerable portion of the twenty years. And the light need not have been actually enjoyed in the sense of having been usefully employed. What is required to satisfy the Act is that the actual physical access of light existed, and was capable of being usefully employed by the occupier of the building with respect to which the claim is made.

L. R. 4 Ex.
126; 38 L. J.
Ex. 124.
(1869)

Thus, in the case of *Courtauld v. Leigh*, the house of the plaintiff had been completed, as to its external and internal walls, roofs, floors, and windows, more than thirty years, but the fittings, papering and painting were not completed, and the house was not habitable or rendered habitable till about fifteen years before the date of the action. Notwithstanding these facts, however, it was held by the Court of Exchequer that the plaintiff had acquired the statutory right to light; in fact, that the enjoyment was by ownership, and not by occupation or user.

L. R. 40 Ch.
D. 21. (1889)

In *Cooper v. Straker*, plaintiff was owner of a building having moveable shutters, which, though generally closed, could, at plaintiff's pleasure, be opened at any time for the admission of light from over the defendant's land. Held, that proof that this state of

affairs had continued for over twenty years was sufficient to throw upon the defendant the onus of proving that a right to light had not been acquired by the plaintiff under the Prescription Act.

But, again, the light must be enjoyed with buildings;

For in *Roberts v. Macord*, where the defendant, on being sued for pulling down the plaintiff's wall, pleaded that it obstructed the access of light and air to his timber yard and saw pit, Patteson, J., told the jury that the plea could not be supported in law. 1 Mood. & Rob. 230. (1832)

And in *Potts v. Smith*, where the plaintiff sought to restrain the erection of the defendant's buildings on the ground that they would interfere with and injure his garden, Malins, V.-C., held: "There can be no prescription for light and air over open ground, because the prescription for ancient light is a thing of limited extent." L. R. 6 Eq. 311. (1868) Page 318.

In *Harris v. De Pinna*, Chitty, J., held that a timber shed composed merely of an iron roof, with columns at the corners to support it, was not a structure within the meaning of the Act. The words of the Act are "dwelling-house, workshop or other building," and Mr. Justice Chitty held that "other building" here meant a building in the nature of a dwelling-house or workshop, and not any sort of an erection. This case was carried to the Court of Appeal, where it was decided, however, on another point. 35 Ch. D. 288. (1887)

The period of enjoyment necessary to give a title to light is fixed by the Act at twenty years. The fourth section of the Prescription Act provides that—

2 & 3 Will. 4,
c. 71, s. 4.

"each of the periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question."

In the case of *Flight v. Thomas*, the Court of Exchequer Chamber held that where an easement of light has subsisted for nineteen years, and a portion of the twentieth, and is then obstructed by the owner of the soil, the right may be claimed at the end of the twenty years, there not having been an interruption for a whole year, the Chief Justice (Tindal) observing: "There are difficulties attending the Act whichever way it is construed. If construed in favour of the plaintiff below, it follows that an enjoyment for nineteen years and a fraction will establish the right, provided the action be brought before the interruption has continued for the

10 L. J. Ex.
529; 8 Cl. &
F. 231.
(1841)

full period of a year. If decided in favour of the defendant below, then we must hold an obstruction for less than a year to be an interruption. We hold the obstruction in this case was no obstruction within the meaning of the Act." The House of Lords afterwards affirmed the decision of the Exchequer Chamber.

This decision appears to the authors open to very serious question.

Next it is necessary to consider what is an interruption within the meaning of the Prescription Act.

2 & 3 Will. 4,
c. 71, s. 4.

The 4th section provides, "That no act or other matter shall be deemed an interruption within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made."

20 L. J. Ex.
362; 15 Jur.
965. (1851)

In the case of *The Plasterers' Company v. The Parish Clerks' Company*, Lord Campbell observed: "In this statute an interruption seems to mean a physical interruption. . . . It seems to me that there must be an actual discontinuance of the enjoyment by reason of an obstruction submitted to or acquiesced in for a year."

Ceasing to use the light will not amount to an interruption within the meaning of the Act.

11 L. J. N. S.
Q. B. 284; 3
Q. B. 581.
(1842)

In *Carr v. Foster*, which related to rights of common, there had been a considerable cessation of enjoyment or user, but it was held by Lord Denman that "without interruption" was not synonymous with "without intermission."

41 Ch. D. 268.
(1889)

In *Presland v. Bingham*, the plaintiff had a window overlooking the defendant's yard. This window had existed for over twenty years, but it had been subject all the time to temporary interruptions occasionally by having empty packing cases packed before it. No evidence was given to show that it was ever obstructed in this way for a whole year at a time. The Court of Appeal, reversing North's, J., decision, held that there was no interruption within the Prescription Act. Cotton, L. J., in his judgment said: "I may say my own opinion is that if it appears upon the evidence of the plaintiffs that there has been an interruption of a permanent character—one likely in its nature to be of a permanent character—then it would lie on them to show that it did not in fact last for a

year; but if on the evidence it appears that the interruption is not likely to be of a permanent character—one which from its very nature is not of a permanent character—it lies upon the defendant, who objects to the light having been gained, to show by his evidence that there has been an interruption which has been existing and acquiesced in for more than a year.”

The right to light acquired by twenty years' enjoyment is indefeasible. One of two tenants under the same owner of adjoining premises may acquire the right to light against the other, and the right as acquired against a lessee is valid as against his landlord. The same holds good where the right has been acquired against a tenant for life. The remainderman or reversioner is also bound.

Lord Cranworth observed in *Tapling v. Jones*: “It surely cannot be contended that the remainderman, because he could not otherwise prevent the owner of the house from acquiring this right, might before the expiration of twenty years come on the land of the tenant for life, and there erect a building to obstruct the light of the new windows.” 11 H. L. C. 290; 34 L. J. C. P. 342—S. (1865)

And again, in *Simper v. Foley*, Wood, V.-C., observed: “An easement of this description acquired against the owner of a leasehold interest in the servient tenement is acquired against all the world, and therefore against the owner of the reversion.” 2 Joh. & H. 555. (1862)

It is to be observed that the twenty years' enjoyment demanded by the Prescription Act need not be an enjoyment as of right. The words of the Act are, that if a right to light is enjoyed for twenty years, it is to be deemed indefeasible, “unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose *by deed or writing*.” Two cases upon this point may be mentioned.

In *The Mayor, &c. of London v. The Pewterers' Company*, it was held that a verbal consent, even when it was accompanied by the payment of rent for the light, was not sufficient to prevent the Prescription Act operating. 2 M. & Rob. 409. (1842)

And in the recent case of *Mitchell v. Cantrill*, it was held that the 37 Ch. D. 56. (1888)

reservation by the lessor in the plaintiff's lease of a right to obstruct the plaintiff's lights was not enough to make the plaintiff's enjoyment of the lights an enjoyment with the defendant's consent. Accordingly, where it was proved that plaintiff had enjoyed the use of the lights for over twenty years, it was held that he was entitled to them as ancient lights within the Act, and that the lessor was not entitled to obstruct them.

Alteration of Ancient Lights.—Where ancient lights exist in a building, the rights in connection with them will not be lost, even though the building be pulled down and rebuilt.

1 Dr. & Sm. In *Turner v. Spooner*, Vice-Chancellor Kindersley held that a
467; 30 L. J. plaintiff was at liberty to improve his lights by substituting light
Ch. 801. modern sashes and plate glass for old windows with heavy frames
(1861) and lattices, though he could not change the position of his light or increase the original aperture.

31 Ch. D. 554. In *Scott v. Pape* the plaintiff, who was entitled to three ancient
(1886) lights in a structure, pulled it down without keeping any accurate record of the position, &c. of the old lights. He then built another structure on almost the same place as the old one, and put six windows in it. It was proved that three of the new lights corresponded substantially with the three old ones. Held, that there was no abandonment, and that the plaintiff was entitled to an injunction to protect the three new lights which corresponded to the three ancient ones. The Court, however, said that a deliberate neglect to record the position and size of the ancient lights in a building which was being thrown down might be considered a sufficient ground for refusing to grant an injunction to protect new lights purporting to represent the old ones.

11 H. L. C. And in *Tapling v. Jones*, already referred to, the plaintiff had
290; 34 L. J. made alterations in his ancient lights. The defendant obstructed
C. P. 342. the lights of the altered building, and the new windows in the
(1865) building were so situated that the defendant could not obstruct them without also obstructing the site of the ancient windows. The plaintiff then altered his ancient windows back again to their former condition, and closed up his new windows.

The House of Lords held that the plaintiff was entitled to protection in the enjoyment of his ancient lights, even though altered.

L. R. 9 Eq. **Extent of Right.**—In *Dyers' Company v. King*, the principle that
438. (1870) a plaintiff was entitled to have his ancient lights protected was carried still further than earlier cases. In this case it was held that the ease-

ment of a plaintiff to have his light and air unobstructed by the defendant's newly erected buildings, is not lost or diminished by the circumstance that by means of clearance effected in the neighbourhood by other parties shortly before the defendant's alterations, the plaintiff acquired more light than the defendant's buildings could subtract. In giving judgment, James, V.-C., said: "The right is a right as between the owner of the dominant tenement and the owner of every servient tenement; he has a right to as much light to and for the use of his house over his neighbour's land as he enjoyed twenty years ago; and the neighbour has no right to deprive him of the light which has so come to and for the use of the house over the neighbour's land, because the owner of the dominant tenement has, either by purchase from or by the free gift of any other person, or by the operation of an Act of Parliament, obtained other light in addition to that which he has a prescriptive right to."

Again, in *Lanfranchi v. Mackenzie*, the question was as to light for special purposes. It was held that in order to establish the right to the access of an extraordinary amount of light necessary for a particular purpose or business to an ancient window, uninterrupted and known enjoyment of such light in the manner in which it is at present enjoyed and claimed, must be shown for a period of twenty years. L. R. 4 Eq. 421. (1867)

And in *Kelk v. Pearson*, it was held by the Court of Appeal that the owner of an ancient light is entitled to prevent his neighbour from obstructing the access of light, so as to render the house possessing the ancient light substantially less fit for occupation. L. R. 6 Ch. 809. (1871)

Nor is the owner of an ancient light limited in his right by the present purposes to which his premises are devoted; for it was held in *Moore v. Hall*, that the purposes for which the plaintiff's premises had actually been used while the light had been enjoyed were not the proper measure of the right, and that a direction to give damages if they thought that there was such a diminution of light as to make the premises less fit for the purposes to which they then were, or *might hereafter be*, made applicable, was right. L. R. 3 Q. B. D. 178. (1878)

Height of Obstruction.—Many persons hold the view that if the obstructing building does not exceed in height the width between it and the obstructed building, no right to relief or damages exists. This view, however, though sometimes true to the extent that no diminution of the

plaintiff's light will result, does not rest on any good authority.

L. R. 9 Ch.
212. (1873)

In *The City of London Brewery Co. v. Tennant*, the Lord Chancellor, Lord Selborne, observed that the fact that the height of a building above an ancient light is not greater than its distance is not conclusive evidence that the light is not injuriously affected, but is *primâ facie* evidence of there being no such interference with the light as the Court will restrain, and requires to be rebutted by special evidence of injury.

L. R. 24
Ch. D. 282.
(1883)

And *Parker v. First Avenue Hotel Company* was to the same effect, viz.: that where the height of the obstructing building was not greater than its distance from the building having ancient lights, it must always be a question of fact whether there was an obstruction of light.

33 Ch. D. 471.
(1886)

Persons whose ancient lights are being obstructed have two remedies open to them. They may bring an action for damages, or they may apply for an injunction restraining the defendant from proceeding with the building which causes or is likely to cause an obstruction of the plaintiff's light, though under Lord Cairns' Act (21 & 22 Vict. c. 27), it is always in the discretion of the Court to give damages instead of an injunction. (See *Greenwood v. Hornsey*.) To succeed, however, in equity, the plaintiff must be able to show that his light will be materially and substantially interfered with. The plaintiff must also take care to proceed with sufficient promptness. He must not stand by and leave the defendant to conclude that he does not object to the obstruction of his light. He may, in that case, be held to have acquiesced in the defendant's proceeding. But should the defendant, knowing that the plaintiff is absent, take advantage of his absence to run up a building which obstructs his lights, the fact that the building was finished before complaint made will not prevent the Court issuing a mandatory injunction to pull it down. (*Lawrence v. Horton*.)

6 Times L. R.
317. (1890)

Right to Air.—As to rights to access of air, as distinguished from access of light, it would seem that such rights can be acquired at common law by long user, though they do not come within the Prescription Act. The right, however, must be to access of air through a definite aperture, such as a window or ventilator.

In *Webb v. Bird* it was decided that no right could be acquired by long user to a current of air to a windmill, and in *Bryant v. Lefever*, that no right could be so acquired to access of air to a chimney. The latter case is important to architects. The defendant there built his house so high that it caused the chimney of the neighbouring house which had been standing for over thirty years to smoke. Held that no action lay.

13 C. B. 841.
(1863)
L. R. 4 C. P.
D. 172. (1879)

In *Dent v. The Auction Mart Company*, however, an injunction was granted to remove and prevent obstructions to ventilation. In that case the plaintiff's staircase was lighted by windows which admitted air, and the defendant proposed to build this up in a "box with the lid off" by a wall eight or nine feet distance, and some forty-five feet high, and into this space to open three water-closets. In deciding this case Wood, V.-C., said: "There are difficulties about the case of air as distinguished from that of light, but the Court has interfered to prevent the obstruction of all circulation of air; and the introduction of three water-closets into a confined space of this description is, I think, an interference with air which this Court will recognize on the ground of nuisance. That is, perhaps, the proper ground on which to place the interference of the Court, although in decrees the words light and air are often inserted together as if the two things went *pari passu*."

L. R. 2 Eq.
242. (1866)

In the more recent case of *Hall v. The Lichfield Brewery Company*, damages were given for an obstruction to the access of air. The plaintiff was owner of a slaughter-house to which for upwards of thirty years he had enjoyed a free access of air through two apertures. Fry, J., said that the right to the access of air could undoubtedly be acquired at common law, not by prescription, but by an implied covenant. In the case of a dwelling-house the covenant was "not to interrupt the free use of salubrious air." In the case before him, the implied covenant was "not to interrupt the free access of air suitable for the purposes of a slaughter-house."

43 L. T. 380;
49 L. J. Ch.
655. (1880)

A sufficient number of cases has now been quoted to show

the legal protection afforded to owners of ancient lights and of rights to air. Architects designing new buildings or re-buildings will therefore see that they must keep their designs within legal limits, or else they may involve their employers in litigation and delay. If the architect finds that a new building, designed to meet his client's instructions and requirements, will, as a matter of fact, obscure the ancient lights of an opposite or adjoining proprietor, he should give his client proper warning; otherwise, if the result is unfavourable to his client, he may, and very probably will, lay the blame on the architect. A professional man is expected to know better than his employer what the effect of the new building will be on neighbouring lights, and future difficulties are much more easily arranged with adjoining owners before building operations are commenced than when the contractor has been set to work. As a rule, when an aggrieved owner of ancient lights applies for an injunction to restrain the erection of a building likely to obstruct his lights, building operations have to be suspended. Then comes the claim of the contractor for delay, loss of the season, and dismissal of work. When, therefore, there is any risk of these eventualities by proceeding on certain lines, the architect should place the risk clearly and openly before his client.

CHAPTER VI.

PARTY WALLS.

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Party Walls.—The subject of party walls is one which often requires attention on the part of architects and other persons concerned with the erection of buildings. A few observations, therefore, on the law relating to party walls are now submitted.

In the first place, then, the question arises, What is a party wall? Popularly speaking, a party wall is generally understood to be a wall forming the division between two buildings, and with respect to which the respective owners have rights in common. A more formal definition will be found in Gale on Easements, where a party wall is described as

Part III.
Chap. VI.
6th ed. p. 454.

“A wall adjoining lands or houses belonging to two different owners. The common user of such a wall by the adjoining owners is *primâ facie* evidence that it belongs to them in equal moieties as tenants in common.”

As regards property in London, the rights and duties of adjoining owners in party walls are regulated by the Metropolitan Building Act, 1855, the provisions of which regarding them will be found set out at some length further on. We will first, however, state shortly the law concerning party walls independently of that or other special statutes.

Different Kinds of Party Walls.—As to the various mean-

ings in which the term "party wall" is used, it is best to quote the words of Fry, J., in *Watson v. Gray* :

14 Ch. D. 195.
(1880)

"What," he there asks, "is the meaning of the term 'party wall' as there (*in the lease in question*) used? The words appear to me to express a meaning rather popular than legal, and they may, I think, be used in four different senses.

1 Man. &
Ry. 404.
(1827)

8 B. & C.
257, 265.
(1828)

5 Taunt. 20.
(1813)

"They may mean, first, a wall of which the two adjoining owners are tenants in common, as in *Wiltshire v. Sidford*, and *Cubitt v. Porter*. I think that the judgments in those cases show that that is the most common and the primary meaning of the term. In the next place, the term may be used to signify a wall divided longitudinally into two strips, one belonging to each of the neighbouring owners, as in *Matts v. Hawkins*. Then, thirdly, the term may mean a wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements. The term is so used in some of the Building Acts. Lastly, the term may designate a wall divided longitudinally into two moieties, each moiety being subject to a cross easement in favour of the owner of the other moiety."

Not only are there these different kinds of party walls, but a wall may also be a party wall to a certain distance up, and after and above that distance the separate property of one of the adjoining owners.

L. R. 8 Ch.
1084; 43 L. J.
Ch. 123.
(1873)

This appears from the case of *Weston v. Arnold*. There A. and B. owned adjoining structures. A single wall formed the side wall of both, but while A.'s structure was only one story high, B.'s rose several stories higher, and had windows opening out over A.'s roof. Held that this side wall was a party wall only to the height of A.'s structure, and that above that it was the exclusive property of B. In delivering judgment, James, L. J., said: "A party wall is a thing that belongs to two persons as part owners or divides two buildings from one another. It is beyond even the power of the Legislature to make that a party wall which is not a party wall. No doubt they might have made provision to the effect that that which is not a party wall shall, for the purposes of a particular Act of Parliament, be deemed to be a party wall. In the present case there was a part of a wall which divided the property of one person from the property of another. Apparently they were joint owners of the part or jointly entitled to it. It was, therefore, a party wall in one sense, and was probably a party wall in another. I do not know how that may be, but it only divided

the two houses for a few feet in height, and above the few feet there was a wall, which beyond all question was the separate and undisputed property of the plaintiff. Unless there is something in the Act of Parliament which shows a clear intent to the contrary, it appears to me that a wall may be in part of its length a party wall, and in part of its length an external wall, and there is no distinction between height and length. A wall may be a party wall up to part of its height, and may be an external wall for the rest of its height. We have known in this Court cases in which house property in London is intermixed in such a way that one man's basement and cellar extend under another man's shop; and again, the first floor of one house is over the shop of the next house. In such a case there would be a party wall between the two buildings below, which above would be only a private partition between two rooms in the same house. There is nothing in fact or in law to make it impossible or improbable that a wall should be a party wall up to a certain height, and above that height be the separate property of one of the owners. It is clear in this case that there was a party wall and there was a separate wall."

Of course, each of the kinds of party walls enumerated by Fry, J., as before mentioned, may be created, and the rights of each owner in them may be defined, by express agreement. In that case there can be no difficulty, but it is otherwise when there is no express agreement. Then it is a matter of evidence what rights each party possesses in the wall, and so it becomes important to inquire on what evidence the Courts will hold a given wall to be a party wall of a certain kind, and what rights they give to owners in each kind.

First, then, where the party wall is the property in common of the adjoining owners. This is the most usual kind of party wall, and it seems that it is the kind which the Courts will always consider a party wall to be when the only evidence regarding it is evidence of common user, or when the instrument granting or reserving it simply describes it without more as a party wall. This will appear from the following cases :—

In *Watson v. Gray*, already mentioned, the plaintiff claimed *See supra.* under a conveyance, by which the yard walls of his house were to

be "party walls." The defendant, who owned the adjoining house, held under a conveyance containing a similar covenant. Held, that plaintiff and defendant were owners in common of the yard walls.

8 B. & C. 207. (1828) In *Cubitt v. Porter*, plaintiff and defendant were adjoining owners. The plaintiff claimed the wall dividing his ground from the defendant's as his private property, but evidence of common user of the wall was given, and the jury, on this evidence, found that it was a party wall. Held that the evidence of common user justified the jury in finding that the wall was a party wall, and that the wall being a party wall, was the property of the plaintiff and defendant in common.

1 Man. & Ry. 404; 8 B. & C. 259. (1827) Again, in *Wiltshire v. Sidford*, A. and B. owned adjoining houses. B. pulled down his house and rebuilt it, using the side wall of A.'s house as a party wall to support his structure. On action brought by A., contradictory evidence was given as to whether B.'s old house had a separate wall. Judge told the jury that if they were satisfied that there had been only one wall, and that A. and B. had enjoyed the common use of it ever since the houses were built, he was of opinion that no action lay, and that the wall was a party wall. Jury found for the defendant, B. On appeal, held, that where no evidence was given as to the amount of land which each adjoining owner contributed to the site of the dividing wall, evidence of common user should make the wall a party wall, and the adjoining owners in common of the wall and of the ground on which it stood.

As to the rights which each of the adjoining owners possess in a party wall of this description, it appears that each is entitled to a full enjoyment of all parts of it, and if one owner puts anything upon the wall which obstructs the other's full enjoyment, the proper remedy for the latter is to remove the obstruction himself.

See *supra*.

Thus, in *Watson v. Gray* before mentioned, the plaintiff built on the top of the party wall, and the defendant threw down the building erected upon it. Held, that as no action for trespass lay against a joint owner, the defendant was justified in removing the obstruction.

See *supra*.

In *Cubitt v. Porter*, also before mentioned, the plaintiff gradually removed a party wall, rebuilding it and raising it higher. Held, that this removing and rebuilding did not constitute an ouster or trespass, and was justified, and that the proper remedy for the raising higher was for the defendant himself to pull the new wall down to the original level.

In *Stedman v. Smith*, the defendant pulled down a party wall which was held in common with the plaintiff. He afterwards rebuilt it higher than it was before, placed a washhouse against it so as to cover the whole top of the wall, and put a stone in it with an inscription on it that the wall belonged to him. This was held to be sufficient evidence to justify a jury in finding ouster of the plaintiff, and to sustain an action of trespass by the plaintiff, the ousted tenant in common. 8 Ell. & Bl. 1; 26 L. J. Q. B. 314. (1857)

The second kind of party wall mentioned by Fry, J., is where the wall is divided longitudinally into two strips, one belonging to each of the neighbouring owners. The way this kind most usually arises may be seen from the case of

Matts v. Hawkins. Here A. and B. owned adjoining lands. At their joint expense they built a dividing wall, half on A.'s land and half on B.'s land. It was held that as it was known here where each owner's land extended to, the wall was not the property in common of them both, but that each owner owned absolutely the half of it which was built upon his ground. 5 Taunt. 19. (1813)

In cases of this kind, the dividing wall is in no proper sense a party wall. It is rather two private walls built together, and the owner of each half is entitled to do as he pleases with his half. He may pare it off, or build it higher, provided he does not interfere with the other owner's part. Thus, in the case last mentioned, it was held that when one of the adjoining owners raised the whole dividing wall higher, the other was entitled to pull down only the half of the added part which stood upon his half of the wall; pulling down the whole added part would make him liable for trespass.

The third kind of party wall mentioned by Fry, J., is where the wall belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements. An example of this kind occurred in the recent case of

Buchan v. Artlett. Here the defendant held under a lease to one Willshire, a plot of land, parcel of a building estate called Great W. N. 7th April, 1888.

Cherry Orchard. This lease contained a covenant that lessee should build a wall of certain height and thickness on the east boundary of his plot, and the following covenant:—"That all outside walls or fences erected by the said Thomas Willshire, or any person or persons entitled as aforesaid, on the boundary of the said piece of land hereby conveyed, and adjoining any other part of the Great Cherry Orchard aforesaid, be deemed party walls or fences." Plaintiff, who was the landlord of the estate, subsequently leased land to the west of defendant's plot to one, Smart, on an agreement to purchase, and Smart's lease contained covenants similar to those in defendant's. Smart built a boundary wall, but the agreement to purchase not being carried out, the land reverted to the plaintiff, who relet it to another tenant. This new tenant proceeded to heighten the wall which Smart had built, with the intention of making it the gable of a cottage she intended to erect. Defendant, contending that this wall was a party wall, pulled down the added part. Plaintiff thereupon applied for an injunction. It was argued for the defendant that as both parties' lands were parts of a building estate, the proviso that was in the defendant's lease as to boundary walls on the estate being party walls applied equitably to Smart's wall. North, J., held that, assuming that Smart's wall to be a party wall within the meaning of the proviso in Willshire's lease, and that the plaintiff's land was subject to a similar provision, the wall was in no way vested in the defendant, and that though he might use it as a "party wall," as by putting a lean-to against it, or by toothing a door-support into it, the plaintiff could, subject to its being so used, do what he liked with it; and he granted the injunction.

The fourth kind of party wall mentioned by Fry, J., is where the wall is divided longitudinally into two moieties, each moiety being subject to a cross-easement in favour of the owner of the other moiety. Examples of this kind of party wall are not very common. They would seem to arise where the wall was originally a party wall of the second kind, and where each owner's half has acquired by prescription a right of support from the other owner's half, just in the same way as any other building might gain a right of support from an adjoining building. In this case (*Lemaitre v. Davis*), one owner could not pare away his half of the party wall, unless he could do so

See *supra*,
p. 117.
19 Ch. D. 290.
(1881)

without injury to the stability of the other owner's half. As a case bearing on this may be cited

Bradbee v. Christ's Hospital. In that case, the plaintiff owned an ancient house divided by a party wall from the defendants'. The plaintiff's house needed the support of this party wall. The defendants underpinned their half of the party wall, and in doing so injured the stability of the plaintiff's half and so injured the plaintiff's house. It was held that the action lay. Tindall, C. J., in delivering judgment, said: "We are of opinion that the defendants had no right to underpin the party wall either partially or wholly, unless that could be done without injuring the plaintiff's house. It may, indeed, be doubtful whether the plaintiff had a several interest in that half of the wall which was next to his house, or whether he and the defendants were tenants in common of the whole; but in either event an action on the case was maintainable against the defendants in respect to the injury which resulted from the mode of their dealing with it." 4 M. & Gr. 761. (1842)

As regards the user of a party wall of this kind, it would appear that the dominant owner may increase the weight upon the party wall, provided he does not interfere with its stability. (*Sheffield Industrial Society v. Jarvis.*)

W. N. 1871,
p. 208.

Repair of Party Walls.—In the case of party walls of the first kind, *i.e.*, where they are the property in common of the adjoining owners, there seems to be no obligation on either owner to repair, and if one does repair he cannot claim a contribution to the expenses from the other. (*Hunt's Boundaries and Fences.*) This, at any rate, is the law with regard to a house held in common, and there appears to be no good reason why the law should be different when the property held in common is a wall. As laid down by Pollock, B., in

2nd ed.
p. 120; 3rd
ed. p. 160.

Leigh v. Dickson, where the property in question was a house, the doctrine applies to all property held in common. There it was held by him that, unless where the repair was absolutely necessary for the preservation of the property "so as to bring the case within the principle of those decisions in which it has been held that, where an outlay is in the nature of salvage all interested in the thing saved are bound to contribute," there is no authority to show that "effect has ever been given by the Courts to a claim by action by one

L. R. 12
Q. B. D. 194;
53 L. J. Q. B.
120; 50 L. T.
124.
Affirmed,
W. N. 1884,
215. (1883)

tenant in common against another for money which had been expended upon the repair of their common property."

In the second kind of party wall, *i.e.*, where each adjoining owner owns absolutely his half of the wall, of course there is no obligation in one owner to repair his half. He is entitled to do with it as he likes, repair it, or leave it to go to ruin or pull it down, the other owner having no right in it whatever.

In the third and fourth kinds, the one owner has an easement over the whole wall or over the half belonging to the adjoining owner. Here, by the common law with regard to easement, it would seem that not only is the servient owner not bound to repair (*Duncan v. Touch*; *Ingram v. Morecraft*), but where the subject of the easement is an *opus manufactum* (such as a wall), the dominant owner, though not bound to repair, is responsible for any injury which may befall the servient owner through his neglect to repair (*Bell v. Twentyman*). See Gale on Easements, 6th ed. pp. 465, 466.

Though not bound to repair, either of the adjoining owners in any kind of party wall is entitled to repair. Where the party wall is the property in common of them both, either is entitled, if it be necessary to do so, to pull down the wall and rebuild it. (See *Stedman v. Smith*, *supra*.) And where the one has the whole property in the wall, and the other only an easement over it, the latter may enter upon the servient tenement to repair the wall. This appears from the case of

6 Q. B. 909.
(1845)

33 Beav. 49.
(1863)

1 Q. B. 766.
(1841)

L. R. 1 Q. B. D. 234. (1876) *Colebeck v. Girdlers' Co.* There the defendants owned two adjoining houses, Nos. 38 and 40. They granted to Smith a lease of No. 40, with covenant to repair, and afterwards a lease to plaintiff of No. 38 with similar covenants. Plaintiff's house extended over a gateway, and was supported on one side of the gateway by a wall, which was part of No. 40. This wall, through neglect to repair, sank and injured plaintiff's house. Held that at common law there was no implied covenant on the part of the defendants to repair. Mellor, J., in his judgment,

observes: "It may be open to doubt whether the support of the plaintiff's house and the party wall was, strictly speaking, in the nature of an easement or not, but assuming that the right of support in this case is in the nature of an easement founded on implied grant, it is well established that there is no obligation to repair on the part of the owner of the servient tenement, but the owner of the dominant tenement must repair, and that he may enter on the land of the owner of the servient tenement for the purpose. (*Pomfret v. Riccroft.*) We think that the demise to Smith, and the fact that the wall may have become a party wall under that demise, does not affect the question. The defendants had a right to repair the party wall as between themselves and Smith, or if it was in a ruinous state, to take it down and rebuild it without being trespassers (*Cubitt v. Porter*; *Stedman v. Smith*); and we think that the plaintiff might exercise whatever right of repair the defendants had in order to preserve his easement."

1 Saund. 322;
Wms. Notes,
557.

See *supra*.

See also, on this point, the judgment of Jessel, M. R., in the *Standard Bank of Australia v. Stokes*, which is also important as showing how the common law doctrine on this point has been altered by the Metropolitan Building Act.

9 Ch. D. 68.
(1878)

The Metropolitan Building Act, 1855.—As we have already said, the law as to party walls in London is now regulated by the Metropolitan Building Act, 1855, and so we proceed to give the main provisions of that statute on this subject.

18 & 19 Vict.
c. 122, s. 3.

By sect. 3, it defines the term "party wall" as applying to every wall used or built in order to be used as a separation of any building from any other building with a view to the same being occupied by different persons.

The term "*party structure*" includes *inter alia* "party walls," and the following rights are conferred by the statute:

Rights of Building Owner.—83. The building owner shall have the following rights in relation to party structures, that is to say:—

Sect. 83.

- (1.) A right to make good or repair any party structure that is defective or out of repair:
- (2.) A right to pull down and rebuild any party structure that is so far defective or out of repair as to make it necessary or desirable to pull down the same:
- (3.) A right to pull down any timber or other partition that divides any buildings, and is not conformable with the regu-

Metrop.
Building Act,
1855, 18 & 19
Vict. c. 122,
s. 83.

lations of this Act, and to build instead a party wall conformable thereto :

- (4.) In the case of buildings having rooms or stories, the property of different owners intermixed, a right to pull down such of the said rooms or stories, or any part thereof, as are not built in conformity with this Act, and to re-build the same in conformity with this Act :
- (5.) In the case of buildings connected by arches or communications over public ways or over passages belonging to other persons, a right to pull down such of the said buildings, arches, or communications, or any part thereof, as are not built in conformity with this Act, and to rebuild the same in conformity with this Act :
- (6.) A right to raise any party structure permitted by this Act to be raised, or any external wall built against such party structure, upon condition of making good all damage occasioned thereby to the adjoining premises, or to the internal finishings and decorations thereof, and of carrying up to the requisite height all flues and chimney stacks belonging to the adjoining owner on or against such party structure or external wall :
- (7.) A right to pull down any party structure that is of insufficient strength for any building intended to be built, and to re-build the same of sufficient strength for the above purpose, upon condition of making good all damage occasioned thereby to the adjoining premises, or to the internal finishings and decorations thereof :
- (8.) A right to cut into any party structure upon condition of making good all damage occasioned to the adjoining premises by such operation :
- (9.) A right to cut away any footing, or any chimney breasts, jambs, or flues, projecting from any party wall in order to erect an external wall against such party wall, or for any other purpose, upon condition of making good all damage occasioned to the adjoining premises by such operation :
- (10.) A right to cut away or take down such parts of any wall or building of an adjoining owner as may be necessary in consequence of such wall or building overhanging the ground of the building owner, in order to erect an upright wall against the same, on condition of making good any damage sustained by the wall or building by reason of such cutting away or taking down :
- (11.) A right to perform any other necessary works incident to the connection of party structures with the premises adjoining thereto.

But the above rights shall be subject to this qualification, that any building that has been erected previously to the time of this Act coming into operation shall be deemed to be conformable with the provisions of this Act if it is conformable with the provisions of an Act passed in the fourteenth year of his late Majesty King George the Third, chapter seventy-eight, or with the provisions of the said Act of the eighth year of her present Majesty, chapter eighty-four.

Metrop.
Building Act,
1855, 18 & 19
Vict. c. 122,

Rights of Adjoining Owner.—84. Whenever the building owner proposes to exercise any of the foregoing rights with respect to party structures, the adjoining owner may require the building owner to build on any such party structure certain chimney jambs, breasts, or flues, or certain piers or recesses, or any other like works for the convenience of such adjoining owner; and it shall be the duty of the building owner to comply with such requisition in all cases where the execution of the required works will not be injurious to the building owner, or cause to him unnecessary inconvenience or unnecessary delay in the exercise of his right; and any difference that arises between any building owner and adjoining owner in respect of the execution of such works as aforesaid shall be determined in manner in which differences between building owners and adjoining owners are hereinafter directed to be determined.

Sect. 84.
Rights of
adjoining
owner.

Law as to Exercise of Rights.—85. The following rules shall be observed with respect to the exercise by building owners and adjoining owners of their respective rights:—

Sect 85.
Rules as to
exercise of
rights by
building and
adjoining
owners.

- (1.) No building owner shall, except with the consent of the adjoining owner, or in cases where any party structure is dangerous, in which cases the provisions hereby made as to dangerous structures shall apply, exercise any right hereby given in respect of any party structure, unless he has given at the least three months' previous notice to the adjoining owner, by delivering the same to him personally, or by sending it by post in a registered letter addressed to such owner at his last known place of abode:
- (2.) The notice so given shall be in writing or printed, and shall state the nature of the proposed work, and the time at which such work is proposed to be commenced:
- (3.) No building owner shall exercise any right hereby given to him in such manner or at such time as to cause unnecessary inconvenience to the adjoining owner:
- (4.) Upon the receipt of such notice, the adjoining owner may require the building owner to build, or may himself build,

Metrop.
Building Act,
1855, 18 & 19
Vict. c. 122,
s. 85.

on any such party structure any works to the construction of which he is hereinbefore mentioned to be entitled :

- (5.) Any requisition so made by an adjoining owner shall be in writing or printed, and shall be delivered personally to the building owner within one month after the date of the notice being given by him, or be sent by post in a registered letter addressed to him at his last known place of residence : It shall specify the works required by the adjoining owner for his convenience, and shall, if necessary, be accompanied with explanatory plans and drawings :
- (6.) If either owner does not, within fourteen days after the delivery to him of any notice or requisition, express his consent thereto, he shall be considered as having dissented therefrom, and thereupon a difference shall be deemed to have arisen between the building owner and the adjoining owner :
- (7.) In all cases not hereby specially provided for, where a difference arises between a building owner and adjoining owner in respect of any matter arising under this Act, unless both parties concur in the appointment of one surveyor, they shall each appoint a surveyor, and the two surveyors so appointed shall select a third surveyor, and such one surveyor or three surveyors, or any two of them, shall settle any matter in dispute between such building and adjoining owner, with power by his or their award to determine the right to do, and the time and manner of doing any work, and generally any other matter arising out of or incidental to such difference ; but any time so appointed for doing any work shall not commence until after the expiration of such period of three months as is hereinbefore mentioned :
- (8.) Any award given by such one surveyor, or by such three surveyors, or any two of them, shall be conclusive, and shall not be questioned in any Court, with this exception, that either of the parties to the difference may appeal therefrom to the County Court within fourteen days from the date of the delivery of any such award as aforesaid, and such County Court may, subject as hereinafter mentioned, rescind or modify the award so given in such manner as it thinks just :
- (9.) If either party to the difference makes default in appointing a surveyor for ten days after notice has been given to him by the other party in the manner aforesaid to make such appointment, the party giving the notice may make the appointment in the place of the party so making default :
- (10.) The costs incurred in obtaining any such award as aforesaid

See *Standard Bank of British South America v. Stokes*, 9 Ch. D. 68. (1878)

shall be paid by such party as such one surveyor, or three surveyors, or any two of them, may determine:

- (11.) If the appellant from any such award as aforesaid, on appearing before the County Court declares his unwillingness to have the matter decided by such Court, and proves to the satisfaction of the judge of such Court that in the event of the matter being decided against him he will be liable to pay a sum, exclusive of costs, exceeding fifty pounds, and gives security, to be approved by such judge, duly to prosecute his appeal, and to abide the event thereof, all proceedings in the County Court shall thereupon be stayed; and it shall be lawful for such appellant to bring an action in one of her Majesty's superior courts of law at Westminster against the other party to the difference; and the plaintiff in such action shall deliver to the defendants an issue or issues whereby the matters in difference between them may be tried; and the form of such issue or issues, in case of dispute, or in case of the non-appearance of the defendant, shall be settled by the Court in which the action is brought; and such action shall be prosecuted and issue or issues tried in the same manner and subject to the same incidents in and subject to which actions are prosecuted and issues tried in other cases within the jurisdiction of such Court, or as near thereto as circumstances admit:

- (12.) If the parties to any such action agree as to the facts, a special case may be stated for the opinion of any such superior Court as aforesaid; and any case so stated may be brought before the Court in like manner and subject to the same incidents in and subject to which other special cases are brought before such Court, or as near thereto as circumstances admit; and any costs that may have been incurred in the County Court by the parties to such action, as is mentioned in this section, shall be deemed to be costs incurred in such action, and be payable accordingly.

Metrop.
Building Act,
1855, 18 & 19
Vict. c. 122,
s. 85.

86. Whenever any building owner has become entitled, in pursuance of this Act, to execute any work, it shall be lawful for him, his servants, agents, or workmen, at all usual times of working, to enter on any premises for the purpose of executing and to execute such work, removing any furniture, or doing any other thing that may be necessary, and if such premises are closed, he or they may, accompanied by a constable or other officer of the peace, break open any doors in order to such entry; and any owner or other person that hinders or obstructs any workman employed for any of the

Sect. 86.
Power for
building
owner to
make entry
on premises
to effect
works.

Penalty on
persons ob-
structing.

Metrop.
Building Act,
1855, 18 & 19
Vict. c. 122,
s. 86.

Sect. 87.
Security to be
given by
building
owner if
required by
adjoining
owner.

Sect. 88.
Rules as to
expenses in
respect of
party struc-
ture.

purposes aforesaid, or wilfully damages or injures the said work, shall incur for every such offence a penalty not exceeding ten pounds, to be recovered before a justice of the peace.

87. Any adjoining owner may, if he thinks fit, by notice in writing given by himself or his agent, require the building owner, before commencing any work which he may be authorized by this Act to execute, to give such security as may be agreed upon, or in case of difference may be settled by the judge of the County Court, for the payment of all such costs and compensation in respect of such work as may be payable by such building owner.

Law as to Expenses in respect to Party Structure.—88. The following rules shall be observed as to expenses in respect of any party structure; (that is to say),

As to expenses to be borne jointly by the building owner and adjoining owner:—

- (1.) If any party structure is defective or out of repair, the expense of making good or repairing the same shall be borne by the building owner and adjoining owner in due proportion, regard being had to the use that each owner makes of such structure:
- (2.) If any party structure is pulled down and rebuilt, by reason of its being so far defective or out of repair as to make it necessary or desirable to pull down the same, the expense of such pulling down and rebuilding shall be borne by the building owner and adjoining owner in due proportion, regard being had to the use that each owner makes of such structure:
- (3.) If any timber or other partition dividing any building is pulled down, in exercise of the right hereinbefore vested in a building owner, and a party structure built instead thereof, the expense of building such party structure, and also of building any additional party structures that may be required by reason of such partition having been pulled down, shall be borne by the building owner and adjoining owner in due proportion, regard being had to the use that each owner makes of such party structure, and to the thickness required to the respective buildings parted thereby:
- (4.) If any room or stories, or any part of rooms or stories, the property of different owners, and intermixed in any building, are pulled down in pursuance of the right hereinbefore vested in any building owner, and rebuilt in conformity with this Act, the expense of such pulling down and rebuilding shall be borne by the building owner and adjoining owner in due

proportion, regard being had to the use that each owner makes of such rooms or stories:

Metrop.
Building Act,
1855, 18 & 19
Vict. c. 122,
s. 88.

- (5.) If any arches or communications, or any parts thereof, are pulled down in pursuance of the right hereinbefore vested in any building owner, and rebuilt in conformity with this Act, the expense of such pulling down and rebuilding shall be borne by the building owner and adjoining owner in due proportion, regard being had to the use that each owner makes of such arches or communications:

As to expenses to be borne by building owner:—

- (6.) If any party structure, or external wall built against the same, is raised in pursuance of the power hereinbefore vested in any building owner, the expense of raising the same and of making good all such damage, and of carrying up to the requisite height all such flues and chimneys as are hereinbefore required to be made good and carried up, shall be borne by the building owner:
- (7.) If any party structure which is of proper materials and sound, or not so far defective or out of repair as to make it necessary or desirable to pull down the same, is pulled down and rebuilt by the building owner, the expense of pulling down and rebuilding the same, and of making good all such damage as is hereinbefore required to be made good, shall be borne by the building owner:
- (8.) If any party structure is cut into by the building owner, the expense of cutting into the same, and of making good any damage hereinbefore required to be made good, shall be borne by such building owner:
- (9.) If any footing, chimney breast, jambs, or floor is cut away in pursuance of the powers hereinbefore vested in any building owner, the expense of such cutting away, and of making good any damage hereinbefore required to be made good, shall be borne by the building owner.

89. Within one month after the completion of any work which any building owner is by this Act authorized or required to execute, and the expense of which is in whole or in part to be borne by an adjoining owner, such building owner shall deliver to the adjoining owner an account in writing of the expense of the work, specifying any deduction to which such adjoining owner or other person may be entitled in respect of old materials, or in other respects; and every such work as aforesaid shall be estimated and valued at fair average rates and prices, according to the nature of the work, and the locality, and the market price of materials and labour at the time.

Sect. 89.

Account of
expenses of
works to be
delivered to
adjoining
owner within
one month.

Metrop.
Building Act,
1855, 18 & 19
Vict. c. 122.

Sect. 90.

Adjoining
owner may
appeal
against
account.

90. At any time within one month after the delivery of such account, the adjoining owner, if dissatisfied therewith, may declare his dissatisfaction to the party delivering the same by notice in writing, given by himself or his agent, and specifying his objections thereto; and upon such notice having been given, a difference shall be deemed to have arisen between the parties, and such difference shall be determined in manner hereinbefore provided for the determination of differences between building and adjoining owners.

Sect. 91.

Building
owner may
recover if no
appeal made.

91. If within such period of one month as aforesaid, the party receiving such account does not declare in manner aforesaid his dissatisfaction therewith, he shall be deemed to have accepted the same, and shall pay the same on demand to the party delivering the account, and if he fails to do so, the amount so due may be recovered as a debt:

Sect. 92.

Penalty on
delay of pay-
ment by
adjoining
owner.

92. Where the adjoining owner is liable to contribute to the expenses of building any party structure, until such contribution is paid the building owner at whose expense the same was built shall stand possessed of the sole property in such structure:

Sect. 93.

As to ex-
penses in-
curred on
requisition of
adjoining
owner.

93. Where any building owner has incurred any expenses on the requisition of an adjoining owner, the adjoining owner making such requisition shall be liable for all such expenses, and in default of payment the same may be recovered from him as a debt:

Sect. 94.

Penalty on
building
owner failing
to execute
required
works.

94. Where any building owner is, by the Third Part of this Act, liable to make good any damage he may occasion to the property of the adjoining owner by any works authorized to be executed by him, or to do any other thing, upon condition of doing which his right to execute such works is hereby limited to arise, and such building owner fails within a reasonable time to make good such damage or to do such thing, he shall incur a penalty, to be recovered before a justice of the peace, not exceeding twenty pounds for each day during which such failure continues.

Sect. 95.

Consent, how
given on
behalf of per-
sons under
disability.

Consent where Persons under Disability.—95. Where, in pursuance of this Act, any consent is required to be given, any notice to be served, or any other thing to be done by, on, or to any owner under disability, such consent may be given, such notice may be served, and such thing may be done by, on, or to the following persons, on behalf of such persons under disability; that is to say,

By, on, or to a husband on behalf of his wife:

By, on, or to a trustee on behalf of his *cestui que trust*:

By, on, or to a guardian or committee, on behalf of an infant, idiot, or lunatic.

Consent where Persons not to be found.—96. Where any consent is required to be given or any other thing to be done by any owner in pursuance of this Act, if there is no owner capable of giving such consent, or of doing such thing, and no person empowered by this Act to give such consent or to do such thing on behalf of such owner, or if any owner so capable, or any person so empowered, cannot be found, the judge of the County Court shall have power to give such consent, or do, or cause to be done, such thing on behalf of such owner, upon such terms, and subject to such conditions, as he may think fit, having regard alike to the nature and purpose of the subject-matter in respect of which such consent is to be given, and to the fair claims of the parties on whose behalf such consent is to be given; and such judge shall have power to dispense with the service of any notice which would otherwise be required to be served.

Metrop.
Building Act,
1855, 18 & 19
Vict. c. 122.

Sect. 96.

Consent, how
given on
behalf of per-
sons not to
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CHAPTER VII.

CONTRACTS FOR WORKS.

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Usual Mode of Contracting.—In the earlier portion of this work special attention was given to the subject of the law relating to engineers and architects, and it is now proposed to take up the subject from the point of view of the contractor who carries out the works from the designs of the professional man. This branch of the matter is of very great importance, both to employers and their contractors. The former naturally wishes to have his building or work carried into execution in a reasonable time without extras, and to be able to part with his contractor on good terms at the completion of the building or work. On the other hand, the contractor naturally wishes to make as much money as possible out of his contract. He is also desirous of being paid a fair price for all changes involving increased cost to him which are ordered by the employer, or his engineer, or architect. And, like the employer, he, too, is desirous of winding-up his contract without trouble or delay.

Unfortunately, however, in many cases disputes arise between the parties to a building contract. Extras are

ordered, and builder and employer take very different views as to what is a fair price, and very frequently resort has to be had to an arbitration or to legal proceedings.

No precautions will prevent unpleasantness if contractor and employer are unreasonable and try to over-reach one another; but with ordinarily reasonable men of the world difficulties may be guarded against by clearly setting forth in the formal agreement between the parties, their respective rights and liabilities. Many a law suit would be avoided if the contract agreement had been clear in its provisions. Such agreements are often drawn up in a hurry, and it is only after the works have considerably progressed that ambiguities and misunderstandings are found out.

A contract for the execution of a work or building need not be in writing unless the execution of the works is to extend over more than a year. In this respect the contractor and engineer are in the same position. Nor is it absolutely necessary that the price should be settled beforehand. Thus, where an employer directs a builder to repair a house in a certain way, and nothing is said about the price, the employer will be impliedly bound to pay a reasonable sum for the work done. But this method of procedure is open to very serious objections. The employer and contractor may have very different ideas as to what is a reasonable price, and they will in all probability have to refer to a third party, or to a court of law, before they arrive at a settlement. Page 2.

In nearly every case of importance the contractor sends in a tender or formal proposal to execute the intended work or building for a given sum, and in accordance with certain terms or conditions. As a rule these conditions refer to the plans and specifications according to which the work or building is to be carried out, the quality of

See p. 5.

the materials and workmanship, and the time within which the works are to be completed. An acceptance (in writing where the work is to extend over a year) of the tender by the employer will be sufficient to create a valid contract between the parties, except in the case of corporations, where the contract must be under seal. The general and most desirable practice is, however, to have a formal agreement entered into by the parties. In such an agreement the terms and conditions are fully set out, and provision is made for the case of disputes, which are so likely to arise in matters of this kind.

Delay in supplying Drawings.—The employer or his agent, the engineer or architect, must supply necessary drawings and other documents with reasonable promptness for the guidance of the contractor. Delay in this respect may operate to relieve the contractor from his obligation to complete the works within a given period.

L. R. 5 C. P.
310; 39 L. J.
C. P. 129.
(1870)

Thus, in *Roberts v. The Bury Commissioners*, the plaintiff made a contract with the defendants, who acted, *inter alia*, as a burial board, to execute certain works in accordance with drawings supplied by the defendants' architect, and subject to the usual conditions as to workmanship and time. The architect was to supply further necessary drawings, and had power to extend the time for completion in certain events. The contract also provided that on certain defaults being made by the plaintiff contractor, the defendant board might determine the contract and take possession of the works.

The defendants exercised their right and put an end to the contract, on the ground that the contractor had made default in the execution and completion of the works. The contractor attributed the delay to the fact that the architect had not supplied him with the necessary drawings, and had not set out the works in time for him to complete the latter within the stipulated period. This delay on the architect's part was not denied by the defendants, but they alleged that it was not the cause of the plaintiff's default. The plaintiff proceeded against the defendant board and succeeded eventually in the Exchequer Chamber. Mr. Justice Blackburn observing that,

“The contractor, from the nature of the works, could not begin his

L. R. 5 C. P.
325.

work until the commissioners and their architect had supplied him with the plans and set out the land and given the necessary particulars; and, therefore, in the absence of any express stipulation on the subject, there would be implied a contract on the part of the commissioners to do their part within a reasonable time, and if they broke that implied contract the contractor would have a cause of action against them for any damages he might sustain, and the commissioners would be precluded from taking advantage of any delay occasioned by their own breach of contract; for it is a principle very well established at common law that no person can take advantage of the non-fulfilment of a condition, the performance of which has been hindered by himself (see *Com. Dig. Condition (L.)*); and also, that he cannot sue for breach of contract occasioned by his own breach of contract, so that any damages he would otherwise be entitled to for the breach of the contract to him would immediately be recoverable back as damages arising from his own breach of contract."

Adherence to the Drawings, Specification, &c.—It is a usual condition in building contracts that in the execution of the works, the drawings and specification are to be adhered to by the contractor. Any substantial variation or departure from the design as set forth in these documents must be regarded as a breach of the contract, and the employer will not be bound to accept the work executed in a manner contrary to the drawings or specification.

In the case of *Munroe v. Butt*, the plaintiff contractor had undertaken to execute certain work for a given price on houses belonging to the defendant. The work was to be completed on or before a given date, and it was to be performed to the satisfaction of the defendant's architect. The plaintiff executed some work upon the houses, but it was not done according to the terms of the contract. Possession of the houses was resumed by the defendant. On the case coming on for trial it was held that the plaintiff was not entitled to recover on the contract or for work and labour.

8 E. & B. 738.
(1858)

In the recent case of *Whitaker v. Dunn*, the principle of *Munroe v. Butt* was followed, but Lord Coleridge pointed out that in every case where the work done was not a proper fulfilment of the contract, it was always open to the contractor to show that the original contract had been waived by the employer and a new contract substituted for it. The facts in *Whitaker v. Dunn* were as follows:—

3 Times Reports, 602.
25th April,
1887.

The plaintiff undertook to lay down in defendant's laundry floors of granitic concrete of a special kind to the defendant's satisfaction, payment to be on completion at so much a square yard. During the execution of the contract, defendant's manager complained frequently that the work was not being done according to contract, and at length, before the work was finished, the defendant refused to let the plaintiff continue, and wrote to him that he would not pay until the work was done as agreed. On action brought, case was referred to a referee, who reported that part of the work was done properly, and the rest improperly, but not so as to be utterly useless, and that in fact the defendant was using the floors; and he advised that the work done should be paid for according to value. On the report coming up as a special case, the Court—Coleridge, C. J., and Smith, J.,—held that plaintiff was entitled to nothing. Lord Coleridge, in delivering judgment, said: "No doubt, under certain circumstances, though there had been a special contract, and the work had been done under it not according to the contract, the jury or a referee might be justified in inferring an intention to waive the special contract and pay according to value. But there must be some evidence from which such an intention could be inferred. And the question was whether in this case there was such evidence. He thought—after conferring with the referee—that there was not. It appeared that the manager had from time to time complained of the execution of the work, and said it was not being completed according to contract. The referee seemed to have thought that the manager might have stopped the work being executed as it was, and might have insisted upon the pavement being taken up, and that, as he had not done so, it might be inferred that there was an implied contract to pay according to value. But the Court could not assent to this; they did not think that the manager had any authority to waive the performance of the contract, or to accept a substitute for it, nor had he done so in fact. And although the referee had found that the pavement did not require to be taken up, and was not wholly useless, that was not sufficient to show a fresh contract to pay for the work as it was done. The case of *Munroe v. Butt* showed that some evidence was necessary to show a new contract to pay for the work as it was done, and here there was no such evidence. That being so, there must be judgment for the defendants, and there was nothing hard or unjust in this, for men should perform their contracts."

But to entitle the employer to reject the work, and to refuse payment, the departure from the drawings and

specifications must be material and substantial. A mere trifling deviation by the contractor would not suffice. In such a case, however, the employer, though not entitled to reject the whole work, is fully entitled to claim a deduction from the contract price to the extent necessary to alter the work objected to, and make it in accordance with the drawings. This appears from the case of

Wilkinson v. Clements, where James, L. J., held it to be absurd to maintain that a house was not completed because some water pipes required by the building contract had not been put in. L. R. 8 Ch. 96. (1872)

In *Thornton and another v. Place*, Park, J., laid down the principle on which such cases should be decided. There the plaintiff sought to recover 18*l.* alleged to be due on a special contract. The defendant paid 14*l.* into Court, and pleaded that the work done was not according to the specification, and that it would take 10*l.* to alter it. Park, J., in charging the jury, said that "when a party engages to do certain work on certain specified terms, and in a certain specified manner, but, in fact, does not perform the work so as to correspond with the specification, he is not, of course, entitled to recover the price agreed upon in the specification; nor can he recover according to the actual value of the work, as if there had been no special contract. What the plaintiff is entitled to recover, is the price agreed upon in the specification, subject to a deduction; and the measure of that deduction is the sum which it would take to alter the work so as to make it correspond with the specification." Verdict for the defendant. 1 M. & Rob. 218. (1832)

Workmanship and Materials.—Most contracts provide that the workmanship, and the materials employed in the works, are to be the best of their several kinds, and even when there is no such express provision in the contract the law implies one that the workmanship and materials employed shall both be reasonably good. In both these cases, even in the absence of a condition as to previous approval by the employer or architect, if this provision be not substantially performed, the employer can insist that the builder shall pull down and rebuild in reasonable compliance with the contract, and if the builder refuse to do

so he can himself pull down and rebuild, and deduct the cost of doing so from the contract price, or if it be greater than that, recover the excess. At the same time, a strict and literal fulfilment of these provisions is not absolutely necessary. In the words of Tindal, C. J., in

3 Bing. N. C.
743. (1837)

Lucas v. Godwin, such provisions, whether express or implied, are not in the nature of a condition precedent to the right of payment, if they were, "a little deficiency of any sort would put an end to the contract, and deprive the contractor of any claim for payment, but under such circumstances it has always been held that where the contract has been executed, a jury may say what the contractor really deserves."

What the contractor will really deserve depends, of course, on the circumstances of the case. Thus, in

5 C. & P. 337.
(1832)

Cutler v. Close, where the plaintiff had contracted to put a warming apparatus into a church, the defence was that the work as executed did not answer the purpose. The judge told the jury that if they thought that the work was substantial in the main, though not quite so complete as it ought to be under the contract, and could be made good at a reasonable outlay, the proper course would be to find a verdict for the plaintiff, and deduct a sum sufficient to enable the defendant employer to do what was required.

1 Camp. 38.
(1807)

In *Farnsworth v. Garrard*, the plaintiff builder sued for the price of certain works executed in rebuilding a part of the defendant's house. The defence was, that the house was so far out of the perpendicular that it was likely to fall. Lord Ellenborough observed, in giving judgment, "I consider this a correct rule, that if there has been no beneficial service, there shall be no pay; but if some benefit has been derived, though not to the extent expected, this shall go to the amount of the plaintiff's demand, leaving the defendant to his action for negligence. The claim shall be co-extensive with the benefit."

2 C. & M.
214. (1833)

And in *Chappel v. Hicks* (where the defendant had allowed judgment to go against him by default), the mode of measuring the amount to be paid the contractor where the work done was not in accordance with the original agreement, was thus stated by Bayley, B.: "The rule is, that if the contract be not faithfully performed, the plaintiff (contractor) shall be entitled only to recover the value of the work and materials supplied."

Supra.

See also *Thornton v. Place*.

It was at one time held that when an employer objected to the work done under a contract as being defective, he could not in an action for the contract price counterclaim for defective work, but had to pay the contract price and seek his remedy by means of a cross action against the contractors. This is not now the case however; but he may still, if he prefers, proceed by way of cross action. This was the course followed in

Rules of
Court,
Ord. XIX.
r. 3.

Davis v. Hedges, where the defendant, a builder, had carried out certain works for the plaintiff under a contract. The plaintiff alleged that the work had not been performed according to the terms of the specification and contract. The defendant builder had previously sued for his contract price, and the plaintiff paid the amount. The plaintiff then brought his action, alleging non-performance and improper performance of the contract. The Court held that this action was maintainable.

L. R. 6 Q. B.
687; 40 L. J.
Q. B. 276.
(1871)

Approval by Employer.—As, however, it is always a matter of difficulty and expense to prove to the satisfaction of a court of law that the materials or workmanship which have been employed in any works are not of the proper quality, it is usual, in order to prevent such questions arising, to make it a condition of payment that they shall be approved either by the employer himself, or some third party. When the approval is to be by the employer himself, the Court will be very slow to consider such an approval a condition precedent to the right of payment. No man should be judge in his own cause, and the Court will not consider that it was intended that the employer should have the power of deciding absolutely on a question affecting himself, unless the terms of the contract make it clear that such is the case. If, however, the terms of the contract do make it clear that it was intended that the contractor should have no right to payment unless his work was approved by the employer, the Court cannot interfere if the employer refuses to approve, no matter

how unreasonable that refusal may be, provided it is *bonâ fide*. This appears from the important case of *Stadhard v. Lee and others*, which, though turning only on the progress of the works, would appear to apply in principle to approval of the workmanship and materials of the work.

- 32 L. J. Q. B.
75. (1863)
- P. 78.
- In *Stadhard v. Lee and others*, the plaintiff contractor agreed to carry out certain works to the satisfaction of an engineer, and also to the satisfaction of the defendants themselves. The agreement provided that in case the mode of execution of the works and the rate of progress did not satisfy the defendants, they might resume possession of the works and finish them by their own workmen. The defendants did so take possession of the works, and proceeded to complete them. The plaintiff then brought his action for work and labour, but he failed; Cockburn, C. J., remarking, "On carefully considering the contract between the parties, we are satisfied that the intention was that the defendants, if dissatisfied, whether with or without sufficient reason, with the progress of the work, should have the absolute and unqualified power to put on additional hands, and get the work done, and deduct the cost from the contract price payable to the plaintiff. And therefore if these terms had been ever so unreasonable, we should have felt bound to give effect to them, and to hold that so long as the defendants were acting *bonâ fide* under an honest sense of dissatisfaction, although that dissatisfaction might be ill-founded and unreasonable, they were entitled to insist on the condition; and consequently, that the replication which only alleges that their dissatisfaction was unreasonable and capricious, but which stops short of alleging *mala fides* in the defendants in acting as is stated in the plea, is insufficient."

The decision in this case turned more on the question of delay in completion than on that of defective workmanship, but it affirms the principle that even where by the agreement the approval of the employer is a condition precedent to payment, he must use his discretion in a *bonâ fide* manner. If, in the circumstances of the case, the Court can see grounds for questioning the *bona fides* of the employer, it will dispense with the condition precedent, and will form its own opinion as to whether the objections of the employer are well founded.

Approval by Third Party.—In most cases, however, the contract provides that the workmanship and materials are to be executed and supplied to the approval of a third party, who is usually the engineer or architect paid by the employer. This arrangement saves the employer from the invidious position of being judge in his own cause; but it is often objected to, on the ground that the engineer or architect is the agent of the employer, and paid by him, and therefore likely to look at matters from the employer's point of view. Cases sometimes arise in which the employer is the complaining party, but, as a rule, the complaint comes from the contractor, who alleges undue and unreasonable severity on the part of the engineer or architect. Some authorities recommend that there should always be an appeal to an outside person or referee from the decision of the engineer or architect with respect to the quality of the work and materials, and such a provision is introduced in many contracts for works and buildings. Employers object to this mode of determining questions of this kind; as tending to delays and additional expense. A reference during the progress of the works with respect to a question involving only a few pounds may involve the stoppage of a good part of the works, and entail a heavy bill of costs. The better course would seem to be to make the decision of the engineer or architect absolute for the time being, with liberty to the contractor to claim at the completion of the works for any additional expense thrown upon him by the undue exercise by the engineer or architect of his powers under the contract, and that this claim should be determined with all other matters in dispute by an independent arbitrator.

When the engineer or architect is to be the judge of the quality of materials and workmanship, he must exercise his judgment in a reasonable manner. His decisions in

such matters may be called in question by the contractor, unless the terms of the contract are quite clear that his approval is to be a condition precedent to the payment of the contractor. When this is not the case, the decision of the engineer or architect may be questioned by either the employer or contractor; and he may be required to show, in answer to allegations of unfair dealing, or mistake, or unnecessary strictness in his requirements, that he has acted as a reasonable and fair-minded man; and the question whether he has so acted may be left as a matter of fact to a jury. In fact, in such a case, were the contractor to proceed against the employer for the price of work done under a contract, and which had been condemned by the engineer or architect, the latter could only give his opinion as an expert witness for the employer, and the Court or jury would have to decide whether the contractor had made default, so as to justify the disapproval of the work by the engineer or architect, and the employer's refusal to pay the contract price.

Extra Works.—The term extra works, or, more shortly, extras, when used in connection with contracts for works or buildings, may be taken as meaning those items of workmanship or materials which the contractor may be required, under the terms of his agreement, to execute or supply in addition to the workmanship and materials required to complete the work or building in accordance with the drawings and specification. It is often a matter of great difficulty to determine whether an item of workmanship or materials claimed as an extra by a contractor is fairly so or not. In fact, many of the disputes which arise between employers and contractors turn on this point. The contractor alleges that he has executed certain work not shown upon the drawings, and not clearly

described in the specification, and not covered by the contract sum. The employer refuses to regard the item so claimed as an extra. He asserts that the work was necessary to complete in a proper manner the works of the contract; and then recourse is had to a Court of law or to arbitration.

Where, however, the contract provides that the engineer or architect is to determine the price to be paid for extra works, it would appear that he would be entitled to say what were extras and what were not.

Thus, in *Richards v. May*, the contract provided for the erection of certain works, and it was agreed, *inter alia*, that all extras, payment for which the contractor should become entitled to under the contract, should be paid for at the price fixed by the surveyor appointed by the contractor's employer. It was held that this provision impliedly gave power to the surveyor to determine what were extras under the contract, and consequently that his certificate awarding a certain amount to be due for extras was conclusive.

L. R. 10
Q. B. D. 400;
52 L. J. Q. B.
272; 31
W. R. 708.
(1883)

In *Williams v. FitzMaurice* the facts were as follows:—The plaintiff agreed to erect a house according to certain drawings and specifications. The specification contained no mention of flooring, but it concluded with these words:—"The whole of the materials mentioned, or otherwise, in the foregoing particulars necessary for the work must be provided by the contractor." And the plaintiff, in accepting the contract, undertook in writing to do everything necessary to make the house fit for habitation. Plaintiff built the house, but only brought the materials for the floorings to the house, and refused to put them down without further payments. Defendant thereupon determined the contract and put them down himself. Held on action that the flooring was not an extra under the contract. "In my opinion," said Pollock, C. B., "the flooring of a house cannot be considered an extra any more than the doors or windows." "The contract," said Channell, B., "was that the house should be completed, not that the works thereinbefore mentioned should be completed. I think that, looking at the terms of the contract, it would not be reasonable to read it as if it excluded all work not specifically mentioned."

3 H. & N.
844. (1858)

Orders for Extras.—It is frequently provided in contracts for works or buildings that the employer will not be liable

to pay for work alleged to be extra, unless such additional work shall have been ordered in writing by the employer, or his engineer, or architect. Where this is clearly expressed the written order is a condition precedent to payment.

13 C. B. N. S. In the case of *The Thames Iron Works Company v. The Royal*
358; 31 L. J. *Mail Steam Packet Company*, the question of liability for extra
C. P. 169. works arose, and Erle, C. J., observed, "The Court clearly recog-
(1862) nize the doctrine, that where the contract provides that alterations

32 L. J. C. P. shall not be charged for unless they have been authorized in a
68. (1862) particular manner, that provision must be strictly followed, or
else legally waived, in order to enable an action to be maintained

for such alterations." See also *Russell v. Da Bandeira*.
And it would appear that where the architect is the party appointed by the contract to issue written orders for extra work, the order of the employer for such works verbally given will not entitle the contractor to recover.

6 L. T. N. S. This was the state of facts in *Franklin v. Darke and Wife*. Here
291; 3 F. & the plaintiff contracted to do certain work, all extras to be ordered
F. 65. (1862) by a written order. During the progress of the works female defendant, then unmarried, saw that more cellaring would be necessary. She accordingly said to the plaintiff, "You do it, and you shall be paid for it." There was no written order, but it was on trial contended for the plaintiff that the new work was not an extra within the contract, but itself the subject-matter of a new and independent contract. This view, however, the Court declined to take. On appeal the decision was upheld. Martin, B., in delivering judgment, said: "We have referred to Mr. Justice Hill (the judge who tried the case). The statement he has made to us is, that the order, as he understood it to be for extras, was such as was contemplated by the contract itself to be in writing. He is of opinion, and we three concur with him, when there is once a stipulation that it shall be in writing there must be something beyond an order to entitle a person to obtain payment. . . . The learned judge goes on to state that under such circumstances, he is by no means of opinion that there may not be circumstances that may entitle the party to recover, and his ruling was according to that impression."

What will amount to a written order was referred to in the case of *Myers v. Sail*. There by the contract it was made a condition precedent to payment for extras that the extras should be authorized by a written order from the architect. Many extras were so

30 L. J. Q. B.
9; 9 W. R.
96. (1860)

authorized, but some few had been ordered verbally, the architect giving the contractor at the same time a rough sketch, unsigned, of the new works required. The arbitrator held that these latter were not properly authorized, and the Court held that this decision was so obviously correct as not to admit of argument.

But where extra works have been carried out by the contractor, and he is unable to show that they have been ordered in writing in the manner provided by the contract, the Court will endeavour to ascertain whether there has been a waiver of the condition as to the written order. It would be manifestly unfair that the contractor should be induced to execute extra works on the faith of the verbal promise of the employer, or his engineer, or architect, that such extra works would be paid for; and that the employer should get the benefit of those works free of cost. What would amount to a waiver of the condition as to the written order cannot be very closely defined, as there is no express authority on the point. Again, if it can be shown that the extra works claimed for are entirely outside the contract, the want of the written order will not bar the contractor's claim to be paid for such work, as will be seen from the remarks of the Court in the case of *Franklin v. Darke*, already cited.

See *supra*.

Fletcher v. Gillespie is an example of work altogether outside the contract. There the defendant executed a charter-party, under which the goods to be shipped were to be brought to the edge of the wharf at the merchant's expense, the captain rendering the customary assistance. Some of the cargo was at a distance of twenty or thirty yards from the edge of the wharf. The captain applied to have it sent to the edge. The defendant's agent refused, saying that he would abide by the charter-party. Thereupon the captain hired labourers to bring the cargo to the edge of the wharf. On action for expense of hire of these labourers, it was held that the work was altogether *dehors* the contract, and could be recovered for as work and labour, or on the ground that the agent's words imported a promise to pay if the work did not properly, by the charter-party, fall upon the plaintiff.

3 Bing. 635.
(1826)

As will be seen when we come to consider certificates, where the engineer or architect includes in his final certificate any extra works, the question whether these were authorized by a written order the Court will not permit to be raised. The final certificate will estop the employer from disputing his liability on any other ground than one impugning the certificate itself. A progress certificate has, however, no such effect.

Time of Completion.—The contract may expressly state the time within which the works are to be completed, or it may be silent on that point. In the latter case, the law will imply a condition that the works will be completed in a reasonable time. In the words of Blackburn, J., in

L. R. 4 Q. B.
133. (1868)

Ford v. Cotesworth, “whenever a party to a contract undertakes to do some particular act, the performance of which depends entirely upon himself, so that he may choose his own mode of fulfilling his undertaking, and the contract is silent as to time, the law implies a contract to do it within a reasonable time under the circumstances. And if some unforeseen cause over which he has no control prevents him from performing what he has undertaken within that time, he is responsible for the damage. . . . We agree that in estimating what is a reasonable time . . . we are to consider what is a reasonable time under ordinary circumstances.”

4 Jurist, 1034.
(1840)

The case of *Fisher v. Ford* may be mentioned in this connection. There the plaintiff sued the defendant for not building within a reasonable time, he having bound himself by covenant to do so. The defendant set up as his defence that though a reasonable time had elapsed since he undertook by the covenant to build, still the plaintiff had requested him later to carry out that covenant, and a reasonable time had not elapsed since then. There was no allegation that he had, even at time of action brought, began to build. The Court held that the defendant's reply was no defence. There was no necessity for any requisition by the plaintiff to the defendant to build the house.

When the date of completion is expressly stated in the contract, of course that date must be observed. A failure to complete the works before or by it will be a breach of

contract, and formerly the rule at law was that such a failure entitled the employer to repudiate the contract, and refuse payment. This rule, however, was relaxed in Equity. Courts of Equity held that, in the absence of an express stipulation that the date was to be strictly kept, or of circumstances from which such a condition could be inferred, time was not of the "essence of the contract," and a failure to observe it, though a ground for compensation to the employer, was not a sufficient breach to entitle him to repudiate the contract.

The strict rule of law was enforced until lately in common law actions on contracts. See, for instance, the case of

Edwards v. Noble, where the Court held that a contract for the sale of lands, where the vendor failed to make a good title on the date fixed for the conveyance, was thereby void, and that the vendor could not recover damages on the vendee's refusal to accept a conveyance at a subsequent day. L. R. 5 Ch. D. 378. (1873)

Now, however, the rule of equity is made, by the Judicature Act, 1873, to prevail in Courts of Law.

That enactment runs as follows:—"Stipulations in contracts, as to time or otherwise, which would not, before the passing of this Act, have been deemed to be or to have become of the essence of such contracts in a Court of Equity, shall receive in all Courts the same construction and effect as they would have heretofore received in equity. 36 & 37 Vict. c. 66, s. 25, sub-s. 7.

The equitable rule being thus made the rule in all Courts, we may consider shortly when equity will regard a time condition as of the essence of a contract.

The first and most important instance is when the contract expressly stipulates that time is to be of the essence of the contract. "If the parties choose even arbitrarily, provided both of them intend to do so, to stipulate for a particular thing to be done at a particular time, such a stipulation is effectual in equity as well as law." (Per Alderson, B., *Hipwell v. Knight*.)

1 Y. & C. 416. (1835)

Again, time may be implied to be of the essence of the contract when the nature of the work, or the circumstances attending it, show that the time of completion is a matter of importance. Thus, in the case of a contract to make a line of railway, the time for completing which was fixed by the special Act, and the date of completion stated in the contract for the works came very close upon the statutory time, it would be held that time was of the essence of the contract, even though not expressly stipulated to be so, provided the contractor had notice that the company were bound as to time by their special Act.

Most of the cases recorded in the reports refer, not to contracts for works, but contracts of sale. Still, the principle of both classes of contracts is the same, and so an example or two of instances where time has been held to be of the essence of a contract of sale may help the reader.

43 L. J. Ch.
449. (1874)

In *Barclay v. Messenger*, A. held a lease of land on which he was bound, on pain of forfeiture, to erect within a certain time a building of the value of 8,000*l.* A. sold this lease to B., who was to pay 200*l.* at a given date, 800*l.* at another date, and 1,000*l.* at another; and by the terms of the contract, if B. failed to pay on the given date any one of these instalments, the contract became void, and any previous instalments paid were forfeited. B. paid the first two instalments, but failed to pay the third. Thereupon A. declared the contract void. The date then was within a month or two of the time when, if the 8,000*l.* building was not erected, the original lease lapsed. Held, first, that there was an express stipulation that times of payment of instalments should be of the essence of the contract; secondly, that even if that were not so, the nature of the subject-matter of the contract—the original lease—would make them by implication of the essence of the contract.

1 De G. & Sm.
444. (1847)

In *Nobes v. Kilmorey*, Nobes contracted to sell land to defendant. At the time the contract was entered into, the defendant's agent told Nobes that the defendant wanted the land for building on immediately, and that he must accordingly have vacant possession of it at the date fixed for the conveyance. At that date the plaintiff could not give the defendant vacant possession of it, and the defen-

dant thereupon revoked the contract. Held, that he was entitled to do so.

In this connection the words of Lord Romilly, M. R., in *Hudson v. Temple*, may be cited: "When property is wasting, as if a man agree to take a lease of mines or to purchase leaseholds, time is of the essence of the contract, when specified." 29 Beav. 536. (1860)

A third way in which time may be made of the essence of the contract is by express notice given to the contractor after he has failed to complete according to the original contract. If no time for completion be fixed in the original contract, and the contractor does not complete within a reasonable time, or if a time has been fixed, and it is exceeded, the employer is entitled to serve the contractor with a notice that if the work be not completed within a given time he will rescind the contract. (*Fisher v. Ford*, 4 Jurist, 1034. (1840) *supra*.) But, in order that this notice may make time of the essence of the contract, it is necessary that there should have been default on the part of the contractor. In the words of Fry, J., in

Green v. Sevin, "You cannot make a new contract at the will of one of the contracting parties. There must have been such improper conduct on the part of the other as to justify the rescission of the contract, *sub modo*, that is, if a reasonable notice be not complied with." (Compare *Fisher v. Ford*, *supra*.) 13 Ch. D. 599. (1879)

In this case, the defendant contracted to sell certain lands to the plaintiff, no time being fixed for completion. He failed for two years to make a good title. Then suddenly he served a notice on the defendant to conclude within a fortnight. Held, that this notice was not binding on the plaintiff, and that he had still a reasonable time to conclude.

As a general rule, and in the absence of special circumstances, it may be taken that a literal observance of the time of completion, even when time is of the essence of the contract, is not absolutely necessary—what is necessary is that the time fixed should be reasonably adhered to; but the fact that the work was not complete to the last nail

upon the date fixed will not be a sufficient ground for rescinding the contract. (See *Lucas v. Godwin*, *supra*, and 3 Bing. N. C. 743. *Wilkinson v. Clements*, *supra*.)
L. R. 8 Ch. 96.

Of course, time conditions, though of the essence of the contract, can, like any other provision, be expressly waived by the employer. They may, however, without being waived be modified—indeed, most building contracts contain a provision that the architect or owner may extend the time for completion. When the time is so extended, all the other provisions of the contract—such as those about penalties, &c.—remain unaffected; and when the extended time has elapsed, if the works are not then completed, the owner can recover upon them, or retain the amount of the penalties that may accrue out of the contract price.

Not only may time conditions be expressly waived or modified, but they may be waived or modified by implication or tacitly. The most usual way in which they are waived tacitly is by the acceptance on the part of the employer of a new contract. As an example of this, the case of *Wood v. The Rural Sanitary Authority of Tendring* may be cited:—

3 Times Reports, 272.
(1886)

In this case the plaintiff contracted to do certain works within a certain time. If they were not complete by that date, there was to be a penalty of 100*l.* a week; and if at any time the works were not proceeding with proper despatch the defendants might, after notice, determine the contract and enter upon the works. The defendants' engineer had power to extend the time. Plaintiff was delayed in the works by certain alterations in the plans being found necessary. In consequence the engineer extended the time for completion, the original contract on all other points to remain in force. After this a dispute arose between plaintiff and the defendants, and in consequence the plaintiff stopped the works. Thereupon, a notice was served on him that, in consequence of the delay in progress of works, defendants would determine contract. The plaintiff thereupon wrote to the defendant board and asked notice to be withdrawn, and promising, if it was, to carry forward the works with the utmost rapidity. He attended board meeting, where he was informed that

the notice was withdrawn on the terms of his letter. Further delay ensued, and the defendants, after giving notice to determine the contract, entered on the works and completed them themselves. On action by contractor for breach of contract: Held, (1) that the board's acceptance of plaintiff's letter put an end to the original contract and substituted a new one; (2) that the original contract being at an end after the acceptance of the letter, the power given by it of determining the contract and entering on the works was also gone, according to *Walker v. London and North Western Railway Company*; (3) that the original contract being at an end, the penalties reserved in it could not be enforced; (4) that as it had been proved that plaintiff had not carried out his promise to forward the work "with the utmost rapidity," but had been unreasonably long over them, the defendants were entitled to unliquidated damages for the delay.

L. R. 1
C. P. D. 518.
(1876)
See *infra*,
p. 224.

As a general rule, time conditions may be modified, that is, the time for completion may be extended, by the employer, or his engineer, or architect, ordering alterations or extras which delay the work. Thus, in

Westwood v. Secretary of State, &c., the plaintiff contracted to build a ship. The time of completion was fixed. Alterations might be ordered, and the engineer had power to allow for them an extension of time. Failure to complete within the fixed or extended time was to subject the plaintiff to certain penalties. The engineer ordered various alterations, but the time for completion was not extended. Time was exceeded. On action for cost of alterations, defendant counterclaimed for penalties. Plaintiff pleaded in reply to counterclaim that the alterations ordered by the defendant made it impossible to complete within the specified time. To this the defendant demurred. Held that the demurrer was bad.

7 L. T. N. S.
736; 11
W. R. 261.
(1863)

However a contract may be worded as to the time of completion, so that the contractor will be bound by the condition, even though the delay has been caused by alterations and additions ordered by the employer. This was the case in *Jones v. St. John's College*, and contractors should be very careful as to undertaking onerous conditions as to the time of completion.

L. R. 6 Q. B.
115; 40 L. J.
Q. B. 80.
(1871)

It may be taken, however, that the Courts will not imply anything in favour of the employer as to time con-

ditions ; and where a contractor has bound himself to finish a work or building within a given period, he will not, as a general rule, be held to this condition, if extra work be ordered by the employer, or anything be done by the latter which has the effect of delaying the work in any way.

12 Q. B. 1015;
18 L. J. Q. B.
45. (1848)

In *Legg v. Harlock*, the plaintiff contracted to carry out certain works for the price of 418*l.*, but subject to the right of the defendant employer to order extra works or deductions, the value of which was to be added to or deducted from the contract price, as the case might be. The works to be completed by a given date, and on default the plaintiff contractor was to pay a given sum per day for each day which might elapse between the stipulated and actual time of completion. It was also provided that an additional period of time was to be allowed the plaintiff in consideration of any extra works which might be ordered. The contract time was exceeded, but it was held that the excess of time was greater than was necessary for the completion of the extra works, and the defendant employer was allowed credit for the penalty in respect of a portion of the excess of time which was not reasonably necessary for the execution of the extra works which had been ordered.

8 C. B. N. S.
831. (1860)

In *Thornhill v. Neates*, the contract was to erect a number of houses for a given sum, and to have them completed by a given date. A penalty was provided of so much per week to be paid by the builder for each week elapsing between the stipulated and actual time of completion. The buildings were not completed until some time after the date agreed upon. The plaintiff builder, however, alleged that extra works had been ordered before the penalties had begun to run ; that the additional time occupied had been rendered necessary by the execution of the extra works ; and it was held that the original condition as to time had been waived by the second agreement as to extra works, and that the penalty was not enforceable till after the expiration of the time reasonably necessary for the execution of the extra works which had been ordered.

As might be expected, there will almost always be a conflict of evidence as to what is a reasonable time to allow for the execution of additional works ; and if the question be left as a matter of fact to a jury, they are likely to take a very liberal view of the case.

It has been shown already that the employer cannot enforce the penalty provided for the event of the contract time being exceeded, when he has been the cause of the delay. But this equitable doctrine is carried even further than this; for in certain cases the contractor may be entitled to claim damages from the employer for delays caused by the acts or default of the latter.

The case of *Roberts v. The Bury Improvement Commissioners*, L. R. 5 C. P. 310; 39 L. J. C. P. 129. (1870) already referred to, is in point. Here the defendants had been the cause of delay to the plaintiff contractor, and Blackburn, J., observed: "There would be implied a contract on the part of the commissioners to do their part within a reasonable time, and if they broke that contract, the contractor would have a cause of action against them for any damages he might sustain."

Again, in *Lawson v. The Wallasey Local Board*, the plaintiff claimed damages in respect of delay on the part of the defendant board in their failure to remove, within a reasonable time, certain staging which prevented him proceeding with certain dredging operations which he had contracted to carry out at Seacombe Ferry, on the River Mersey. The agreement between the parties provided, that the defendant's engineer should grant an extension of the time of completion, in consideration of any delay in the clearing away of the staging. As a matter of fact the delay was very serious. The engineer issued his final certificate setting out the balances due to the plaintiff contractor, including an amount in consideration of the delay. The contractor was not satisfied with the amount certified for, and brought an action for damages, and it was held that he was entitled to succeed. The delay on the part of the board was unreasonable, and he was entitled to be compensated for the loss to which he had been put to owing to the defendant's delay in removing the staging. L. R. 11 Q. B. D. 229. (1883)

Very stringent conditions are sometimes inserted in contracts as to the time of completion, and contractors, when entering into contracts, should be careful to scrutinize such conditions very closely. As a rule, however, most contracts relating to works and buildings provide that an extension of the stipulated time of completion shall be allowed by the engineer or architect in the event

of strikes amongst workmen, or delays caused by frost or other severity of weather.

Penalties.—Having dealt at some length with the subject of time conditions, it will now be necessary to refer to the penalties, or, more properly speaking, the forfeiture usually attached to the breach by the contractor of such conditions. The penalty clause in contracts, as it is usually termed, provides that, in the event of the contractor's failure to complete the work or building to be executed within the stipulated period, he is to forfeit and pay to the employer a specified sum per day or per week for each day or week, as the case may be, which shall elapse between the stipulated and actual date of completion. The sum of money so forfeited by the contractor is generally spoken of as a "penalty," though in most contracts it is expressed to be as "liquidated damages." To most persons this is a distinction without a difference, but this is an error. There is a very substantial difference between the two terms. The meaning of the term may be easily explained by a simple illustration. Thus, if it be assumed that the forfeiture is fixed at, say, 10% per week for each week's delay, and that this forfeiture is to be regarded as a penalty, the contractor would not necessarily be bound to pay the employer 100%, because there had been ten weeks' delay in finishing the work or building, the subject-matter of the contract. It would only be on proof by the employer that he had been put to loss by the default of the contractor, and that the delay was in no way due to the acts of the employer, or his engineer, or architect, that the Court would award the employer compensation for his loss, and then the amount awarded would not necessarily be 100%, but only such sum as would appear to be reasonable compensation for the loss actually suffered.

If, however, the forfeiture is to be regarded as liquidated damages, or, as it may be popularly expressed, a settled amount, the case would be different. The contractor would be bound to pay the full amount expressed to be forfeited in the event of default. The Court would not investigate the fact whether the employer suffered any damage or not by the delay in completion. The contracting parties made their own bargain, and would have to abide by it.

Whether the sum to be forfeited is of the nature of a penalty or liquidated damages will depend upon the construction put by the Court upon the contract agreement. The mere use of the term liquidated damages will not prevent the Court examining into all the circumstances of the case to ascertain whether the payment expressed to be made by the contractor for delay in completion is to be so regarded. And this is a question for the Court, and will not be left to the jury.

The question whether a sum expressed to be forfeited in certain events is to be treated as a penalty or as liquidated damages was very fully discussed in the case of

Wallis v. Smith. The plaintiff was an owner of an estate, and the defendant was a builder, and they entered into an agreement that the plaintiff should sell the estate to the defendant for a given sum, and the estate was to be built upon by the defendant. The agreement contained, *inter alia*, the provision that if the plaintiff failed to make a good title he should forfeit and pay to the defendant as liquidated damages the sum of 5,000*l.* And the defendant also bound himself, in case he made a substantial breach of the contract, to pay to the plaintiff as liquidated damages a like sum. The defendant made default and did not carry out any of the terms of his agreement, and, as a consequence, the plaintiff proceeded to recover the sum of 5,000*l.* as liquidated damages. It was held that the plaintiff was entitled to succeed. Jessel, M. R., in delivering judgment, laid down the rule that where a contract contains a condition for payment of a sum of money as liquidated damages for the breach of stipulations of varied importance, none of which is for payment

L. R. 21
Ch. D. 243;
52 L. J. Ch.
145; 47 L. T.
389. (1882)

of an ascertained sum of money, the general rule is that the sum named is not to be treated as a penalty, but as liquidated damages.

7 Scott, 364.
(1839)

In *Boyes v. Ancell*, in an agreement the defendant covenanted that he would within a given date demise to the plaintiff certain premises, the indenture to contain certain covenants; and the plaintiff covenanted to accept the lease and execute a counterpart thereof, and bear and pay the expenses of making the lease and counterpart and agreement; and for the true performance of the agreement each of the parties bound himself unto the other in the penalty of 500*l.*, to be recovered against the defaulter as liquidated damages. Held, that this was a penalty and not liquidated damages.

6 Bing. 141.
(1829)

Again, in *Kemble v. Farren*, the plaintiff and defendant agreed that the defendant should for the next four seasons act at the plaintiff's theatre, and also conform in all things to the usual regulations of such theatre, and that the plaintiff should pay him 3*l.* 6*s.* 8*d.* every night the theatre should be open; and the agreement contained a clause that if either the plaintiff or defendant omitted, neglected, or refused to fulfil the said agreement, or any part thereof, or any stipulation therein contained, such party should pay to the other the sum of 1,000*l.*, to which sum it was thereby agreed that the damages sustained by any such omission, neglect, or refusal should amount; and which sum was thereby declared by the said parties to be liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof. Defendant refused to act on the second season. A jury assessed the damages for this breach of contract at 750*l.* The plaintiff contended that such damages should be 1,000*l.*, according to the terms of the agreement. Held, that in spite of the terms of the agreement, the 1,000*l.* was not liquidated damages, but a penal sum.

In both this and the previous case, one of the conditions on breach of which the penalty was to be payable was a condition to pay a sum of money, and on this condition several of the judges, in delivering their decision, laid considerable stress. Both decisions, therefore, are reconcilable with the rule laid down by Jessel, M. R., in *Wallis*

4 C. B. N. S.
97; 27 L. J.
C. P. 146.
(1858)

v. Smith, *supra*. (See also *Reindell v. Schell*.)

Again, the Court may hold that the forfeiture is to be regarded as liquidated damages, even though the term penalty has been employed in the contract.

This was the view taken in *Parfitt v. Chambre*, which was a case of claim under an award. The arbitrator directed certain steps to be taken by the defendant to secure an annuity to the plaintiff by the purchase of a government annuity of the same amount by a given date, and, *inter alia*, awarded that a given sum was to be paid each month by the defendant, in addition to the annuity, in case he made default in purchasing at that date the government annuity. The sum so to be paid was expressed to be by way of penalty. The Court, however, held that the whole sum was payable as liquidated damages.

L. R. 15 Eq.
36; 42 L. J.
Ch. 6. (1872)

And in *Magee v. Lavell*, which was a case arising out of an agreement for the sale of a public house, the sum expressed to be forfeited by the party making default in carrying out the terms of the agreement was described as damages. It was held, however, that the plaintiff, who sued the defendant for failure to complete his purchase, could only recover the amount of damages he had suffered by the defendant's breach. In either the forfeiture was by way of penalty, and not liquidated damages.

L. R. 9 C. P.
107; 43 L. J.
C. P. 135.
(1874)

It may, however, be taken generally that in contracts relating to works and buildings, when the sum to be forfeited for delay in completion is so much per day or per week, whether it is expressed to be by way of liquidated damages or of penalty, the words will be construed to import liquidated damages, unless it be clear from the context that a penalty was intended.

In *Bonsall v. Byrne*, A. entered into an agreement to take down a building, the work to be completed in every respect by a certain day, "under a penalty of 10*l.* per week for every week after the said date." Held, that the 10*l.* per week was not a penalty, but liquidated damages.

1 Ir. Rep.
C. L. 573.
(1867)

Again, in *Crux v. Aldred*, A. contracted to carry out certain alterations, the work to be completed on a certain date, and, in case of non-completion by that date, there was to be a penalty of 40*l.* a week till completion. Held, that this was not a penalty, but liquidated damages.

14 W. R. 656.
(1866)

The following case may be referred to as showing the variety of decisions that have been given on this subject:

L. R. 4
Ch. D. 724;
46 L. J. B.
57. (1876)

Thus, in *In re Newman, Ex parte Capper*, which arose on the

bankruptcy of a building contractor, the builder had contracted to carry out certain buildings, and complete them by a given date. The contract provided, that in the event of non-completion by the given date, the contractor should forfeit to the employer 10% per week for each week during which the building should remain unfinished after the given date. It was also further provided, that in case the contract was not fully performed in all respects, the contractor should pay the employer the sum of 1,000*l.* as liquidated damages. The works were not completed at the stipulated date, and the builder became insolvent. His trustees then took up the works, but finally abandoned them before completion. On the builder being brought into bankruptcy, it was held on appeal from Bacon, C. J., that the 1,000*l.* mentioned in the building contract was not to be taken as liquidated damages, but as a penalty, and the employer could prove in the bankruptcy for the actual damage he had suffered by the builder's default. See, also, *Fletcher v. Dyche*, and *Browne v. Phillips*.

2 T. R. 32.
(1787)

10 L. R. Ir.
212. (1882)

Very frequently employers do not attempt to rely on the forfeiture clause in building contracts. And it is only when, after completion, the contractor sends in a large bill for extras, that they raise the question of liquidated damages in respect of delay on the part of the builder. It may then be too late to successfully put forward such a claim, because the contractor can often show acts and directions of the employer, or his engineer, or architect, which operate as a waiver of the time conditions.

Because the agreement contains a penal condition, it is not to be supposed that in case of breach the employer cannot recover more than the penalty. On the contrary, he can waive his right to the penalty, and bring an action for the actual damages he has suffered through the breach. Moreover, if the contract be one which the Court of Chancery will specifically enforce, or a breach of which it will by injunction restrain (which, as a rule, contracts for works are not), the employer can refuse to accept the liquidated damages, and apply to the Court for a decree for specific performance or an injunction to restrain breach.

See, on this point, the very recent case of *The National Provincial Bank of England v. Marshall* 40 Ch. D. 112. (1889)

There the defendant had contracted under a bond not to take service within a certain distance of his employer, and a certain sum was fixed as liquidated damages for breach. He took service within this distance, and offered to pay the liquidated damages in satisfaction. Held, that they were not a satisfaction, and that the employer was entitled to an injunction.

CHAPTER VIII.

CERTIFICATES.

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Certificates.—Most building contracts of the present day provide that payments to the contractor are only to be made on the certificate of the engineer or architect appointed to superintend the works; or, in legal language, the certificate is made a condition precedent to the payment of the contractor.

A certificate may be defined in general terms as an authorization to the contractor to require and receive payment from the employer. It is addressed to the employer, and states that the contractor is entitled to be paid a given sum in consideration of the due execution of the works of the contract. A certificate need not be in writing, unless the contract so provides.

14 C. B. N. S.
592; 32 L. J.
C. P. 291.
(1863)

Thus, in *Roberts v. Watkins*, the contract contained a proviso that one, T. L., should, before such payment, certify that the works are carried out to his satisfaction; and in his observations to the jury, Erle, C. J., stated, that, “in point of law, a certificate in writing from the architect was not required by this contract, and it was sufficient if he verbally certified his approval.” This view was upheld by the Court, and Byles, J., in giving judgment, remarked, that “it is plain that the usual meaning of ‘certify’ does not require anything written.”

Where, however, the contract declares that the certificate is to be in writing, this requirement must be followed,

and even though writing is not necessary under the contract, still a prudent engineer or architect will always express his approval of works by means of a written certificate.

Progress Certificates.—It is important to distinguish clearly between final certificates and what are known as progress or interim certificates. These latter are issued from time to time by the engineer or architect, and by virtue of them the contractor is entitled to receive payment of instalments of the contract price. These certificates are merely provisional in their character. Some professional men make their progress certificates very simple in form, merely setting forth that the contractor is entitled to be paid a certain sum on account of work done under his contract. In the case of large works, however, the certificates are more detailed. A measurement of the work done to date is made by the resident engineer or clerk of works in company with the contractor's agent. The quantities are moneyed out at the rates contained in the detailed schedule, which is usually attached to the contract agreement. The total value of the work is thus arrived at, and the retention money provided by the contract and the previous payments being deducted, the balance is the amount payable to the contractor. Such measurements are merely approximate, and it is usually declared that the inclusion of any defective work or materials is not to be taken as relieving the contractor from his liability to remedy such defects. This form of detailed certificate has many things to recommend it, but it is open to a very serious objection. Defective work is certain to be measured up now and then, and when once a contractor finds this work included in a certificate and paid for on account, it is very difficult for

the person in superintendence to get the bad work removed or set right.

L. R. 3 App.
Cas. 1045.
(1878)

In *Tharsis Sulphur, &c. Co. v. McElroy*, Lord Cairns, L. C., described a progress certificate as being simply a statement of a matter of fact, viz., what is the weight, and what is the contract price of the materials actually delivered from time to time upon the ground; and the payments made under these certificates are altogether provisional, and subject to adjustment or re-adjustment at the end of the contract.

4 L. R. Ir.
C. P. 486.
(1879)

Reference may also be made to the case of *Richardson v. Mahon*, as showing the relative effect of progress and final certificates. Here the contract provided that the works should be completed to the satisfaction of the architect, but it contained no reference to payment by instalments. Work when partly executed was from time to time approved by the architect, but certain parts of this work were not, however, subsequently completed to his satisfaction. It was held that the contractor was not entitled to recover the value of this work.

Newry Tele-
graph, 9th
May, 1889.

The Newry Navigation Company v. Lawson was a case lately tried in Ireland at *nisi prius* before Murphy, J., and a special jury. The plaintiff company sued the defendant contractor for breach of contract. The contract was entered into in May, 1885, and in terms of it the defendant was to carry out certain works of river improvement for the sum of 32,000*l*. There were the usual covenants as to workmanship, engineer's certificate, and payment by instalment. The works progressed until nearly the whole of the contract sum, with the exception of the reserve, had been paid to the contractor. The engineer in granting certificates for payment had been supplied with measurements of work by the assistant engineer which turned out to have been in excess of what was done. On investigation it appeared that a large amount of work had still to be done under the contract, but though urged to proceed the contractor declined to do any more work, and relied on the engineer's last progress certificate, as being conclusive on the question whether or not the works were substantially completed or not. On the case coming to trial the learned judge told the jury, "That it was clear that the contract had not been performed by the defendants. In fact that this was admitted, but the defendants alleged that the engineer's assistant had led them to believe that the work was finished. That it was for the jury to weigh the evidence on both sides." The jury then brought in a verdict for 8,768*l*., the amount necessary to complete the work left undone by the defendant contractor.

Certificate a Condition Precedent.—Passing on now to the subject of final certificates, it must be pointed out that when speaking of certificates hereafter, the term must be taken as referring only to final certificates which are made by the contract conditions precedent to payment. Where, then, in any contract the engineer or architect's certificate is made a condition precedent to payment, the contractor cannot recover unless he has first obtained the certificate; and even though the engineer or architect withholds the certificate under circumstances which would not, in the opinion of a jury, justify his so doing, still the contractor cannot get rid of his obligation to produce the certificate as his authority to demand or recover the amount he believes to be due to him. Provided there is no fraud on the part of the engineer or architect in the withholding of the certificate, and no undue influence on the part of the employer to induce the withholding of the certificate, the want of the certificate is a complete bar to the contractor's right to recover.

Scott v. The Liverpool, Corporation is a case in point. There the plaintiff entered into a contract with the defendants to do certain works. The contract contained a condition that if the plaintiff did not, in the opinion of the defendants' engineer, carry on operations in such a manner as would permit of the works being completed according to the contract, the defendants might determine the agreement, and the engineer might certify for what work he thought the plaintiff had actually done. The contract between the plaintiff and the defendants was determined by the defendants under this condition: the engineer gave no certificate. Plaintiff filed a bill in Chancery against the defendants and their engineer, complaining of undue delay on the part of the engineer in certifying and seeking payment of what plaintiff contended was due under the contract. No fraud or collusion was alleged. The bill was dismissed with costs, on the ground that, in the absence of the engineer's certificate, plaintiff had no right of action.

Clarke v. Watson is to the same effect. There by the contract certain works were to be done by the plaintiffs, and paid by instalments on production of the surveyor's certificate that they were

3 De G. & J.
334; 28 L. J.
Ch. 236.
(1858)

34 L. J. C. P.
148; 18 C. B.
N. S. 278.
(1865)

done to his satisfaction. In an action against the employer upon this contract the statement of claim alleged that the works contracted for had been properly executed so as to entitle the plaintiffs to the surveyor's certificate, but that he had wrongfully and improperly neglected and refused to give it. Held, on demurrer, that, in the absence of collusion or fraud, no action lay.

1 Cab. & El.
125. (1885)

Another case which, though merely at *nisi prius*, may be cited, because of the clear statement of the law given in the summing up, is *Brumsden v. Beresford*. That was an action by a builder for a balance of account alleged by him to be due from the owner. By the contract the architect's certificate was to be a condition precedent to the right of payment. No certificate for the balance now sued for was given, and the plaintiff alleged that it was withheld through the procurement of the defendant (the building owner). Mr. Justice Watkin Williams, in summing up, told the jury: "If you think that the architect, acting upon his own judgment, withheld this certificate, you must find a verdict for the defendant. If, however, you are of opinion that the withholding of the certificate was due to the improper interposition of the defendant, and that he prevented the architect from giving his certificate, you must find a verdict for the plaintiff." Verdict for the plaintiff.

The final certificate of the engineer or architect binds not only the contractor but the owner. The latter is not allowed to go behind it, and, in the absence of fraud or of collusion between the professional man and the contractor, he will be bound to pay the amount certified for, even though the work was not ordered in the manner required by the contract, or was not executed in a proper way.

35 L. J. C. P.
12. (1865)

Another case showing the binding character of certificates is that of *Goodyear v. Mayor of Weymouth*, where the plaintiff contractor claimed for balance due to him on foot of contract and extras. By the terms of the contract the architect was to certify the proper sum to be paid for the works and extras, and his decision was to be final. It was held that the architect's certificate that a certain sum was due precluded the defendants from raising the question whether there was any order in writing for the extras. Mr. Justice Willes observing: "If you employ an architect who does not know his business, and who certifies that he is satisfied when he ought not to express satisfaction, you must be bound by his mistake."

In the important case of *Laidlaw v. The Hastings Pier Company*, the effect of the certificate issued by the company's engineer was fully discussed. The plaintiffs were contractors, and had entered into a contract with the defendant company for the erection of a pier at Hastings. The works had been completed, and the plaintiffs sued for the balance of money shown to be due to them by the engineer's final certificate. The defendants resisted the claim of the plaintiffs on the grounds that certain sums should be credited to them in respect of penalties as provided in the contract, the works not being completed within the stipulated period; also that the engineer had allowed for in his certificate certain works alleged by the plaintiffs to be extras, and which had not been authorized in the manner provided by the contract; and that the engineer had also allowed for certain works claimed for as extras by the plaintiffs, but which as a matter of fact had not been duly authorized, nor even executed.

Exch.
Chamber,
27th Nov.
1874.

The case was tried in the Court of Exchequer, and the decision was in favour of the plaintiff contractors. The Exchequer Chamber, on appeal in error, affirmed the decision of the Court below, holding that the defendants had disentitled themselves to insist on the penalties, on the ground that they had made payments to the contractors after the expiration of the stipulated date of completion (16th March, 1871), and had not deducted any sum in respect of penalties. Further, that the engineer had power under the contract to extend the time of completion, and that having issued certificates from time to time after the stipulated date of completion, and having taken no account of penalties in his final certificate, was evidence to show that he had extended the time. Further, that the last certificate of the engineer precluded the defendants from raising the question whether extras had been done, or done without countersigned orders; and that the facts stated in the case showed that differences had arisen, and that the certificate of the engineer was a decision upon them within the meaning of the contract.

Lord Chief Justice Coleridge, in giving judgment, observing: "I do not think that he (the engineer) is an arbitrator under the deed. He seems to me to have treated as agent for the defendants, but clothed with peculiar functions; and when he exercises those functions, they are to be conclusive or otherwise, as the deed provides. There are a variety of matters, all conditions precedent, but all these matters are to be taken into account by the engineer, the agent of the defendants to protect them, and the engineer is to go into all these matters, and to satisfy himself that the conditions precedent to a right of payment have been fulfilled. But when the

engineer has once ascertained, and has once given his decision, it does not lie in the mouth of the defendants, who have placed their own agent in the position of control, to say, 'You have neglected your duty to us: therefore we will not pay according to your certificates.' And the deed goes further—it says, in fact, that the engineer is to decide in all matters of dispute and difference between the parties; and in my opinion differences have arisen. Therefore, on the true construction of this contract, I am of opinion the certificate is conclusive, and the defendant company must pay."

Building
News, 4th
March, 1887.
Birmingham
Assizes.

In *Biggs v. King's Norton Rural Sanitary Authority*, the plaintiff, a contractor, sued the defendant board and their surveyor, Godfrey, for the value of certain extra works alleged to have been executed in connection with a sewerage scheme carried out for the defendant board. The contract between the plaintiff and the board provided that all matters in dispute should be left to the surveyor, whose decision was to be final and binding on both parties. The plaintiff disputed the allowance made him in respect of extras by the surveyor, and charged collusion and fraud against the surveyor and the board. Huddleston, B., who tried the case without a jury, observed: "That though the judgment of the surveyor might be wrong and fallacious, it was binding on the plaintiff and the board, unless fraud was proved on the part of the surveyor." His Lordship then gave judgment for the defendants with costs, and refused the plaintiff leave to appeal.

1 Cababe &
Ellis, 486.
Building
News, 20th
February,
1885.

In *Lapthorne v. St. Aubyn and others*, which was tried by A. L. Smith, J., without a jury, the plaintiff, a builder, claimed payment of the sum of 522*l.*, alleged to be due by the defendants on foot of a contract for building a church. The sum claimed included extra works, and the balance of the contract price. The contract provided that extras over 10*l.* were to be ordered in writing by the defendants, and that the certificate of the architect was to be binding on both parties. The architect had gone into the matter, and had issued his certificate for the sum claimed. The defendants pleaded that the architect had certified for works as extras which were not so, and for works as extras not duly ordered by the defendants, and that there was collusion between the plaintiff and the architect. This latter allegation, however, was withdrawn early in the case.

The learned judge held that both sides were bound by the architect's certificate. Neither party could, in the absence of fraud, go behind it. All charges of fraud had been abandoned by the defendants. Judgment was then given for the plaintiff in the full amount claimed, with interest and costs.

In *Salisbury v. The Isle of Wight Sanatorium*, the plaintiff builder had executed certain works for the defendants under a contract which made the decision of the defendant's architect final in all matters. The architect issued his final certificate showing a given sum due to the plaintiff. The defendant company had not objected before the architect to the claim of the plaintiff. The defendants had paid a small portion of the sum named in the final certificate, but declined to pay the balance. The plaintiff brought his action on a specially indorsed writ. Defendants then applied to a judge in chambers for leave to defend, which was granted. On appeal by the plaintiff to the Divisional Court against this order, the Court affirmed the decision of the learned judge, on condition that the defendants brought into Court the sum of 400l., which represented about three-fourths of the amount claimed.

Building
News, 6th
February,
1885 (Q. B.
D.) Divisional
Court.

Lord Bateman v. Thompson came before the Divisional Court (Coleridge, C. J., Grove, J., and Archibald, J.). The facts of the case were as follows:—In 1856 the defendant contracted to make alterations to the house of the plaintiff. The work and materials to be supplied and executed to be proper and substantial, and to the satisfaction of the plaintiff and his architect; but as regards any defect discovered in the work within twelve months after completion, the certificate of the architect was not to be a bar to any action by the plaintiff. The architect's certificate was given in September, 1861. After the lapse of twelve months certain defects appeared. The facing stone was proved unsuitable for external purposes. The plaintiff then brought his action against the contractor, but the Court held that, quite independently of the proviso as to the twelve months' limit, the plaintiff could not succeed, that he had no right of action against the defendant, and there must be judgment for the latter. Archibald, J., observing, in giving judgment: "I think it is clear that the architect is to give a certificate, not only as to the completion of the work, that is to say, when the work is finished, but that he is to be the judge of the soundness and sufficiency of the materials; and I think the meaning of this covenant must be, that if the work is done to his satisfaction, and to that of Lord Bateman, that the satisfaction is expressed both with regard to the character of the materials and the workmanship, and to the fact that it has been finished and duly completed; and that being so I think the true view of the covenant is, that when that is once done, and there is no fraud (and none is imputed here), that there is a performance of the covenant. Now this proviso reflects light upon the covenant. The object certainly must be to give that right of action which there otherwise would not be."

Legal Hand-
book, Jenkins
& Raymond,
3rd ed. p. 259.
(1875)

Fraudulent Refusal to Certify.—But, as already pointed out, the engineer must act *bonâ fide* in the refusal to certify. If it be alleged by the contractor that the certificate has been withheld by reason of fraud on the part of the engineer or architect, or through undue influence on the part of the employer, or even perhaps if withheld from sheer carelessness on the part of the engineer or architect; and if the contractor can establish his allegations to the satisfaction of a Court of Equity; relief will be granted to the contractor, and the necessity for the production of the certificate will be set aside. The engineer or architect who feels bound to refuse to certify for work done under a contract should set out clearly, for the information of the contractor, the matters complained of, so that the latter may have an opportunity of remedying defective workmanship and materials, and thus entitle himself to ask that the certificate be issued. The engineer or architect should act throughout on the assumption that his conduct will be fully investigated in Court by an impartial tribunal. The contractor should get the fullest notice of everything complained of, and the engineer or architect should be able to prove this.

But see *Clarke v. Watson, supra.*

To show that the contractor can recover against the owner without a certificate, when the certificate is refused through fraud, it is only necessary, after the cases already cited, to refer to one more—that of

32 L. J. Ex.
177; 2 Hurl.
& C. 42.
(1863)

Batterbury v. Vyse. There the plaintiff agreed to do work for the defendant to the satisfaction of the defendant's architect, and no money was to be considered due until the architect's certificate for it was produced by the plaintiff. The architect refused to certify, and the plaintiff, in his declaration, alleged that he refused through the procurement of, and in collusion with, the defendant. On demurrer, it was held that this was a good cause of action, and that the action lay.

Again, where the contractor procures the engineer's

certificate fraudulently, or in collusion with the engineer, the employer is not bound to pay the amount certified for.

This appears from the case of *The Wakefield and Barnsley Banking Co. v. The Normanton Local Board*, already referred to. There 44 L. T. N. S. 697. (1881)
the contractor undertook to construct a reservoir. Payments were made to him on the engineer's certificate, until the defendants discovered that the reservoir would not hold water, when further payments were refused. On action brought, the defendants agreed to pay the contractor in six months a less sum than the balance due on the contract. The contractor assigned this agreement to the plaintiffs, to whom he owed more than the sum agreed to be paid. Before the elapse of the six months, the defendants discovered that the engineer and contractor were acting in collusion, and they thereupon refused to pay the sum agreed upon to the plaintiffs. On action, judgment was given for the defendants. This is a strong case, since the plaintiffs were not parties to the fraud, but innocent holders of the agreement for value.

CHAPTER IX.

ARBITRATION.

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Arbitration.—In the ordinary course of things, an employer or contractor who may feel aggrieved by the acts or defaults of the other, must seek his remedy by an appeal to a Court of law, unless the contract agreement provides that the decision or certificate of the engineer or architect is a condition precedent to the payment of the contractor. In this case, as has been fully explained already, the contractor cannot sue the employer for the balance alleged to be due to him until the engineer or architect has spoken. On the other hand, the employer will be equally bound to submit to the decision or certificate of the engineer or architect. In fact, the determination of the engineer or architect will be conclusive and binding on both parties, because they have mutually bound themselves to this effect.

Very strong objections, however, have been urged against this mode of settling disputes between employers

and contractors. The engineer or architect is the agent of the employer. He is paid by the latter: *primâ facie*, if he has a bias at all, it will be in favour of the employer who pays him, and with whom he naturally wishes to stand well. Thus his position is an invidious one, and no matter how impartial his decisions may be, the contractor will be inclined to regard them with suspicion.

The claims for extra payment put forward by the contractor are frequently the outcome of strained relations between the engineer or architect and the contractor.

With a view to the relief of contractors under such circumstances, it is now very common to introduce into contracts an arbitration clause, giving an appeal from the engineer or architect's decision to an arbitrator or arbitrators named in the contract, or to be appointed when the necessity arises to call upon their services. The determination of the arbitrator is made binding on the parties, and thus litigation is prevented.

But it is one very serious objection to arbitrations as generally conducted, that the expense far exceeds the cost of an action. A great amount of time is wasted, because the arbitrator cannot conduct the inquiry in the same expeditious and business-like manner as a judge in Court. Again, the arbitrators are often in a great difficulty on the question whether certain evidence should be admitted or rejected. If one of their number is a lawyer, or if they have a legal assessor, this difficulty will not arise; but where they have no such assistance, they are entirely at the mercy of opposing counsel, whose views as to the law of the case are generally as wide asunder as the poles.

The various enactments dealing with arbitration have recently been consolidated and amended by the Arbitration Act, 1889, and the Rules made in connection therewith. As this Act, however, applies only to England, it will be

necessary occasionally to refer to the earlier statutes on the subject which are still practically the law in Ireland, the terms of the Irish Common Law Procedure Act being, as far as the clauses referring to arbitration are concerned, identical with those of the corresponding English Act.

Arbitration and Valuation.—It is important to distinguish between arbitration and valuation. The distinction cannot be better stated than in the words of Lord

53 L. T. N. S. Esher, M.R., in *Re Dawdy and Hartcup* :—
800. (1886)

“The word ‘arbitration’ in sect. 17 of the Common Law Procedure Act, 1854, must be taken to mean a judicial proceeding in which the arbitrator is bound to hear the parties, and hear evidence, if evidence is produced, to give a judicial decision. It has been held, therefore, that if a person is appointed to value he is not an arbitrator, for he is not acting judicially when he values, but is merely using his own skill and his knowledge as to that which he values; and the same is the case where each party appoints a valuer.”

L. T., 3rd
May, 1890.

These words apply equally to the word “arbitration” as used in the Arbitration Act, 1889 (see *Re Hammond and Waterton*); and accordingly the provisions of that statute do not apply to mere agreements to have a valuation taken by one or two valuers.

Matters referred.—In framing an arbitration clause in a contract, care is necessary to define clearly what matters are intended to be referred to arbitration in case of dispute. There are a number of modes of dealing with the matter which may shortly be mentioned.

There is the general reference to arbitration of all matters of dispute, including the engineer or architect’s disapproval of workmanship and materials, when called in

question by the contractor; the proper meaning of the drawings and specifications; the question whether works claimed for are extras or within the contract; whether the instalments paid on account have been of sufficient amount, having regard to the terms of the contract; and, in fact, anything which the contractor may choose to bring forward by way of claim, and anything which the employer may advance by way of claim or counterclaim.

Again, there is the limited reference clause which leaves the engineer or architect the sole judge as to works and materials, but allows an appeal to arbitration on the questions whether the engineer or architect has been unduly severe upon the contractor in such matters, and the compensation to be allowed in consideration thereof, if the undue severity be proved. Also, the further question of fair allowances for additional works.

Lastly, there is the still more limited reference clause, under which the arbitrator can only deal with the fair prices to be allowed for extra works and deductions respectively which have been duly authorized.

It is clearly a matter open to discussion which is the best mode of drawing the reference clause. Contractors, as a rule, desire an arbitration on all possible points, while it is urged against this that an arbitration about a particular part of a building while the latter is in progress is certain to lead to delays, and subsequent claims for loss due to those delays.

On full consideration it would appear to be the most satisfactory mode of dealing with the question to make the engineer or architect the final judge of workmanship and materials, but providing an appeal to arbitration on all matters of account, including the question of compensation to the contractor for alleged over strictness of the engineer or architect in the matter of workmanship or

materials. Very clear and express terms should be used in defining the matters with which the arbitrators are empowered to deal, because, as a matter of fact, arbitrators, as a rule, are inclined to assume that they may deal with any matter that is put before them.

14 Ch. D. 200;
42 L. T. 710;
28 W. R. 845.
(1879)

In *Piercy v. Young*, it was held by the Court of Appeal that in ordinary cases the Court will decide whether any matter came within the terms of the submission. "Of course," Jessel, M. R., said, in giving this decision, "persons can agree to refer to arbitration, not merely disputes between them, but even the question whether the disputes between them are within the arbitration clause." But, in the absence of an agreement to this effect, the extent of the reference may be considered by the Court.

Submission to Arbitration.—As contracts for works and buildings are almost always in writing, the submission should also be in writing. (The Arbitration Act, 1889, applies only to written submissions. See sect. 27.) And in certain cases the submission should be under seal, as, for instance, where the reference arises out of a contract with a corporation. As a rule the submission is contained in a separate instrument, but in some cases a clause in the contract agreement may be framed to serve the same purpose. It must be remembered, however, that a submission to arbitration will not act as a bar upon legal proceedings; an action may be brought in the same matter.

7 C. B. 71.
(1845)

Thus, in *Harris v. Reynolds*, it was held that a plea that the plaintiff and defendant had agreed to refer, that they actually had referred, and that the arbitrators were actually considering the matters in dispute, and that a reasonable time had not elapsed for the award, was not sufficient to bar an action on the matters in dispute.

L. R. 4 Eq.
77. (1876)

Again, in *Cooke v. Cooke*, it was held that an agreement to submit the affairs of a partnership to arbitration, and that the submission shall be made a rule of a Court of Common Law, cannot be pleaded in bar to a suit in equity, seeking discovery and complaining of the plaintiff being sued in actions, and praying for a receiver; although before the bill was filed the arbitrators were appointed, and since the bill was filed the submission has been made a rule of Court.

In this last case the facts were peculiar. The plaintiff and defendant were partners. They agreed to dissolve partnership, and to appoint arbitrators to wind up the partnership accounts, and to settle the disputes arising out of them. Arbitrators were appointed, but they did not proceed to business for some time. Meanwhile, the defendant retained possession of the partnership effects, books, and papers. After much delay, and an extension of time for award, during which several actions were brought against the plaintiff for partnership debts, the plaintiff filed a bill in equity for discovery and for a receiver. Then the defendant, on the strength of the agreement to refer containing a condition that the submission might be made a rule of Court, made it a rule of a Court of Common Law, and when the bill came on for argument maintained that the Court of Equity had no jurisdiction, that no Court could interfere but the Court of which the submission had been made a rule. The Court of Equity held that it had jurisdiction until the award was made. After that only the Court of which the submission had been made a rule had, under the Arbitration Act of William III., jurisdiction in the matters of the award.

It is to be observed that, as far as England is concerned, the Arbitration Act of William III. is now entirely repealed.

Arbitration
Act, 1889
(52 & 53 Vict.
c. 49).

But though a submission to arbitration, or an agreement to submit, will not be a bar to an action on the matters in dispute; still, if a person, after agreeing to refer matters to arbitration, refuses to do so, an action will lie against him for breach of agreement.

This appears from the case of *Livingstone v. Ralli*. There the plaintiff and defendant agreed to refer differences arising out of the sale of a cargo of corn to the arbitration of two corn-factors of London. Such differences arose, and the plaintiff desired to refer them to arbitration, but the defendant refused to do so. The plaintiff thereupon brought an action for breach of agreement, and it was held that it lay. 24 L. J. Q. B. 268. (1855)

The case of *Brunsdon v. Local Board of Staines* may also be mentioned in this connection, as showing the measure of damages in actions for refusing to go to arbitration. These extra works had not been ordered in the manner required by the building contract, and the architect refused to certify for them. By the terms of the contract, the architect's certificate, if accepted, was to be final; if it were not accepted, the matters in dispute were to go to arbitration. 1 Cab. & El. 272. (1884)

The plaintiff accepted the architect's certificate, but only on account, and demanded that the balance claimed should be submitted to arbitration. The defendant refused to go to arbitration. Thereupon the plaintiff brought an action for the extras not certified for, and not ordered in the proper manner, and also for breach of the agreement to refer. Held, that he could not recover for the extras improperly ordered beyond the amount certified, and that, therefore, as the arbitrator must have decided against him, damages for refusal to arbitrate should be merely nominal.

Where, moreover, a party has entered into an agreement to refer disputes to arbitration, and then brings an action in respect of the same matter, the Court will, as a rule, stay proceedings on the application of the defendant. The authority to do so was first given by the Common Law Procedure Act, 1854, section 11. That provision, however, has been repealed and re-enacted by the Arbitration Act, 1889.

17 & 18 Vict.
c. 125.

52 & 53 Vict.
c. 49.

Sect. 4 of the Arbitration Act, 1889, runs as follows:—"If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that Court to stay the proceedings; and that Court, or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

"Submission" is defined by sect. 27 to mean "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not."

This provision, as has been said, is substantially a re-enactment of sect. 11 of the Common Law Procedure Act, 1854, and so the Courts in interpreting it will, no doubt, follow the decisions on the earlier Act. We will therefore enumerate some of the more important of these.

Briefly put, the effect of the section is to throw the

plaintiff back on his remedy by arbitration in the manner provided by the agreement to refer, as will be seen by a perusal of *Roper v. London*.

1 E. & E. 825;
28 L. J. Q. B.
260. (1859)

To obtain the advantage of this power of the Court to stay proceedings, the application must be made before the delivery of the defence. (See *West London Dairy Society v. Abbott*, and *Smith v. British Marine Assurance Association*.) And, further, the defendant who applies to the Court to stay proceedings must show that he was ready and willing to proceed with the reference when the plaintiff brought his action. This is done by affidavit, as will be seen by a reference to *Piercey v. Young*.

44 L. T. 376;
29 W. R. 584.
(1881)
28 Sol. J. 47.
(1883)

The granting of the order to stay proceedings is entirely within the discretion of the Court, as was pointed out in

L. R. 14
Ch. D. 200;
28 W. R. 845
(1879)

Wickham v. Harding. And in *Willesford v. Watson*, which related to a mining partnership, it was held, on appeal, by Lord Selborne, that the fact that one of three defendants was not ready and willing to proceed to arbitration would not necessarily be a ground for refusing the order asked for to stay the action.

28 L. J. Ex.
215. (1859)
L. R. 8 Ch.
473; 42 L. J.
Ch. 447.
(1873)

In *Russell v. Russell*, it was held by the Court that the burden lay upon the plaintiff, who objected to proceed to arbitration on terms of the agreement, to show some good grounds why the matter in dispute should not be referred.

L. R. 14
Ch. D. 471;
49 L. J. Ch.
268. (1880)

But if proper grounds are shown, the Court will refuse to stay the proceedings. This was the course adopted in

Sury v. Pearson, where the Court came to the conclusion that the object of the defendant, who asked for a stay of the action, was merely to cause delay to the plaintiff.

1 C. B. N. S.
639. (1857)

And again, in *Young v. Burkett*, a stay of proceedings was refused on the ground that the time limited for settling the disputes by arbitration had then expired, except as to one isolated dispute arising out of the other differences.

51 L. J. Ch.
504; 46 L. T.
268. (1882)

In *Pickthall v. The Merthyr Local Board*, the action was brought by the plaintiff, a contractor, claiming a balance alleged to be due to him in respect of a reservoir and other works constructed for the defendants. The defendants applied to Day, J., in chambers, to have the action stayed, and the matters in dispute referred to arbitration in accordance with the terms of the contract agreement between the parties. The defendants further alleged that the

Building
News, 16th
July, 1886.

reservoir had been constructed in a faulty and defective manner, and that it would take a large sum of money to make it efficient. The learned judge refused the order to stay, on the ground that there was "sufficient reason" within the meaning of sect. 11 of the Common Law Procedure Act, 1854. The matter then came by way of appeal from the decision of Day, J., before the Divisional Court (Wills and Grantham, JJ.). It appeared that by the terms of the contract agreement, all disputes should be referred to the arbitration of the clerk of the defendant board. The Court, held, however, with Day, J., that the reference should not be to the clerk of the board; but they declined to allow the action to proceed. They thought the arbitration clause in the contract should be adhered to, provided that the arbitrator was a person not in the employment of the defendant board. The matter was then adjourned to allow the parties to select an independent arbitrator.

Building
News, 13th
February,
1885.

The result was otherwise, however, in the Scotch case of *Mackay v. Local Authority of Barry* (N. B.) which came before Lord Kinnear. The plaintiff claimed payment from the defendant board of the sum of 1,248*l.*, being balance of the contract price and value of extras in connection with the construction of certain water-works at Carnvastie. The defendants resisted the claim on the ground that it was barred by an arbitration clause in the deed of contract, under which all claims were to be submitted to the arbitrament of the engineer. Lord Kinnear sustained this plea, and the case was referred to arbitration in the terms of the contract.

Solicitors'
Journal,
8th March,
1890.

In *Re Carlisle, Clegg v. Clegg*, the plaintiffs were the executors of a deceased partner, who were suing the surviving partners for amount alleged by them to be due to their testator in respect of his interest in the partnership. After delivery of statement of claim, and before delivery of defence, the surviving partners applied to the Court to stay the action on the ground that an agreement to refer partnership disputes to arbitration existed. The plaintiffs in reply urged that the sole point in dispute was one of law. North, J., held that it would be absurd to refer a legal point to an arbitrator, who would probably refer it back to the Court under sect. 19 of Arbitration Act. Order made: that summons should stand over till after defence was delivered, then either party could apply to the Court to decide any point raised. If, after that point was decided, there remained any question of accounts, he could send that question to arbitration.

The last case, however, that need be referred to as showing how the Court exercises its discretion in granting

or refusing an order to stay proceedings, is the important one of

Hughes and Stirling v. The Corporation of Liverpool. The plaintiffs, builders, had brought an action against the Corporation of Liverpool to recover the balance of the contract price and the value of certain extra works, alleged to be due in connection with the erection of certain artizan dwellings. The present proceedings were taken by the defendant corporation by way of motion to have the action stayed, and all the questions in dispute referred to the arbitration of the city engineer, in accordance with the provisions of the contract between the parties. The motion came before the V.-C. of the County Palatine of Lancaster.

Building
News, 13th
August, 1886.

The total contract price of the buildings was 50,000*l.*, and the plaintiffs claimed in addition the sum of 8,000*l.* The contract provided that all disputes whatsoever should be referred to Mr. C. Dunscombe, the city engineer, as arbitrator. This gentleman was also the engineer under whose superintendence the works had been carried out. He had refused to allow the claim of 8,000*l.* for extras put forward by the plaintiffs. The defendants sought to have the action stayed, and the whole matter referred to the city engineer. The contractors objected to this. They would not have the city engineer as arbitrator: he was not independent, as many of the matters claimed for arose in consequence of his own acts, and he would, if appointed arbitrator, be practically acting as judge in his own cause. The corporation argued contra, but the Vice-Chancellor held that it would be improper to force the plaintiffs to go before the city engineer under the circumstances, and he therefore refused the motion for a stay of proceedings, with costs against the corporation. (Compare *Jones v. Rhondda and Swansea Bay Rail. Co.*) *Infra*, 213.

Of course, in order that the Court may stay proceedings in an action on matters agreed to be referred to arbitration, the agreement to refer must be of such a nature as to be capable of being enforced by the Court. Thus, in

Deutsche Springstaff Actien Gesellschaft v. Briscoe, it was held by the Divisional Court, affirming Pollock, B., that where there is an agreement to refer future disputes to particular arbitrators, and the submission to these is revoked (*as to which see now sect. 1 of Arbitration Act, 1889*), and an action brought, there is no existing agreement to refer capable of being enforced, and therefore there is no right to stay proceedings.

L. R. 20
Q. B. D. 177.
(1887)

Award made Condition Precedent.—It is possible, however, to tie the hands of parties, so that they cannot take legal proceedings in lieu of proceeding to arbitration in the terms of their agreement to refer. This is done by inserting the proviso in the arbitration that the determination of an arbitrator in the manner prescribed is to be a condition precedent to the right to sue. The cause of action will then only accrue when the arbitrator has made his award, and it will be limited to the amount awarded by the arbitrator. The leading case upon this is

5 H. L. Cases, 811. (1856) *Scott v. Avery*, which is to the following effect:—A. effected, in a mutual insurance company, a policy of insurance on a ship. One of the conditions of the policy was that the sum to be paid to any insurer for loss should, in the first instance, be ascertained by the committee; but if a difference should arise between the committee and the insurer “relative to the setting of any loss, or a claim for average, or any other matter relating to the insurance,” the difference was to be referred to arbitration in a way pointed out in the conditions: “provided always, that no insurer who refuses to accept the amount settled by the committee shall be entitled to maintain any action at law or suit in equity on his policy,” until the matter has been decided by the arbitrators, and “then only for such sum as the arbitrators shall award,” and the obtaining the decision of the arbitrators was declared a condition precedent to the maintaining of an action. Held, that these conditions were lawful, and that (even should the difference relate to other matters than those of mere account) till award made, no action was maintainable.

A case of a different kind, but turning on the same principle, is

11 Ex. Rep. 237; 36 L. J. Ex. 129. (1856) *Brown v. Overbury*. Here the dispute related to the prize for a horse race. By the conditions of entry, the prize was to go as the four stewards of the race should determine. Two stewards were in favour of the plaintiff's horse, the other two adverse. In an action for the prize, it was held that the decision of the stewards was a condition precedent to the right to recover it.

L. R. 2 Ex. 237; 36 L. J. Ex. 129. (1867) Further, in *Elliott v. Royal Exchange Assurance Company*, which arose on a claim on foot of a fire policy, the covenant for payment was made subject to certain articles, including a provision that the

loss or damage, after the same shall be adjusted, shall be immediately paid in money by the defendant company; and in case any difference should arise touching any loss or damage, such difference shall be submitted to arbitrators, whose award in writing shall be conclusive and binding on all parties. On action being brought by the plaintiff, the company pleaded this article, and that the plaintiff had not submitted the matter to arbitration. It was held, Bramwell, B., dissenting, on demurrer, that the covenant was only a covenant to pay the adjusted loss, and that the plaintiff had no cause of action. Bramwell, B., while denying that the present case came within the law, entertained no doubt as to what the law was. He stated it as follows:—"If two persons, whether in the same or in a different deed from that which creates the liability, agree to refer the matter upon which the liability arises to arbitration, that does not take away the right of action. But if the original agreement is not simply to pay a sum of money, but that a sum of money shall be paid if something else happens, and that something else is that a third person shall settle the amount, then no cause of action arises until the third person has so assessed the sum. For to say the contrary would be to give the party a different measure or rate of compensation from that for which he has bargained."

The modern case of *Viney v. Bignold* may also be referred to. L. R. 20
It also arose on an insurance policy. The conditions of the policy Q. B. D. 172.
contained the following clauses:—"The amount of every loss will be (1888)
paid without discount or deduction within sixty days after the same shall have been established to the satisfaction of the directors. . . . If any difference shall arise in the adjustment of a loss, the amount (if any) to be paid by the society shall, whether the right to recover on the policy be disputed or not, and independently of all other questions, be submitted to the arbitration of some person to be chosen by both parties, or of two indifferent persons, one to be chosen by the party insured and the other by the directors. . . . And in case of the arbitrators differing therein the amount shall be submitted to the arbitration of an umpire to be chosen by the arbitrators before they proceed to act, and the award of the arbitrators or umpire, as the case may be, shall be conclusive evidence of the amount of loss; and the party insured shall not be entitled to commence or maintain any action at law, or suit in equity, upon his policy until the amount of his loss shall have been referred and determined as hereinbefore provided, and then only for the amount so awarded. . . ."

The plaintiff brought his action on foot of the policy, and the

defendant company pleaded the arbitration clause in bar; and on the matter coming before the Divisional Court (Wills and Grantham, JJ.) it was held that the determination of the amount by arbitration was a condition precedent to the right to recover on the policy, and the defence was an answer to the action. Wills, J., in giving judgment, observed: "The principle on which cases such as the present ought to be decided is very clear, and it is this: The Court must look and see what the covenant is. If there is a covenant to pay the amount of the loss, accompanied by a collateral provision that the amount shall be ascertained by arbitration, such arbitration is not a condition precedent to the maintenance of an action on the covenant; but if the parties have covenanted that the liability is only to arise after the amount has been adjusted by arbitration, then such adjustment is a condition precedent to the right to recover."

L. R. 4 App.
Cas. 674.
(1879)

The following cases were referred to in the judgment of the Court: *Collins v. Locke*, *Roper v. Lendon*, and *Elliott*

1 E. & E. 825.
(1859)

v. Royal Exchange Assurance Company.

L. R. 2 Ex.
237. (1867)

Revocation.—At common law, a party can revoke his submission to particular arbitrators at any time before the award is made, but a general agreement to refer cannot be so revoked. Thus, if there is an agreement to refer disputes generally, and a particular arbitrator be appointed to decide some particular difference that has arisen, either party may revoke the submission to the arbitrator; but the general agreement to refer cannot be revoked, and the Court may appoint an arbitrator and stay any action brought in violation of the agreement to refer.

L. R. 6 C. P.
212; 40 L. J.
C. P. 145.
(1871)

In *Re Rouse and Meier*, Willes, J., observed: "Before the passing of 9 & 10 Will. 3, c. 15, it was competent to either party to revoke his submission; and it was not competent to him to make the submission irrevocable, any more than it was competent to him to make irrevocable an appointment of an ordinary agent without an interest . . .; for, as is said in *Vynior's Case*, 'my act or my words cannot alter the judgment of the law to make that irrevocable which is of its own nature revocable.'"

8 Co. Rep.
81 b.

But a statutory limit was placed upon the power to

revoke by the 39th section of an Act passed in the reign of King William the Fourth, which is as follows :

“That the power and authority of any arbitrator or umpire appointed by or in pursuance of any rule of Court or judge’s order or order of nisi prius in any action now brought, or which shall be hereafter brought, or by or in pursuance of any submission to reference, containing an agreement that such submission shall be made a rule of any of his Majesty’s courts of record, shall not be revocable by any party to such reference without the leave of the Court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a judge; and the arbitrator or umpire shall, and may, and is hereby required to proceed with the reference notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference.”

3 & 4 Will. 4,
c. 42, s. 39.

This provision has been repealed by the Arbitration Act, 1889, and the following enacted instead :—

“A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a judge, and shall have the same effect in all respects as if it had been made an order of Court.”

52 & 53 Vict.
c. 49, s. 1.

Appointment of Arbitrators.—It is always very desirable, if possible, for the parties to a reference to agree upon a single arbitrator. And now, by sect. 2 of the Arbitration Act, 1889, if no other mode of reference is provided in the submission, the reference shall be to a single arbitrator. The mere saving in expense is, in itself, a sufficient reason for this. Generally speaking, the arbitrators appointed by the parties act as mere advocates for their respective sides, and the umpire really holds the scales. If then, the parties could select one person of skill and reputation, all the time occupied by the arbitrators in agreeing upon an umpire would be saved, and the unpleasant discussions so often seen at arbitration meetings would be avoided.

Where the parties cannot agree upon a single arbitrator, or the arbitrators cannot agree upon an umpire,

Arbitration
Act, 1889,
ss. 5 and 6.

the appointment can be made by a judge upon an application by summons, or the submission may provide for the appointment being made by, say, the President for the time being of the Institution of Civil Engineers, or some other person of like eminence.

26 L. J. Q. B. 34; 5 E. & B. 404. (1855) In selecting an umpire, the appointment must be signed by both the arbitrators in each other's presence, otherwise it will not be a good appointment, as will be seen from *Lord v. Lord*; but see also *Re Hopper*.

36 L. J. Q. B. 97; L. R. 2 Q. B. 367. (1867) The umpire may be appointed at any time within the period allowed for making the umpirage: see *Harding v. Watts*; and *Re Johnstone and Collie*.

See Arbitration Act, 1889, Schedule (B). 15 East, 556. (1812) But the best course is to appoint the umpire at once, which it is competent to do. (*Bates v. Cooke*, and *Winteringham v. Robertson*.)

24 L. J. Q. B. 63. (1854) 9 B. & C. 407. (1829)

27 L. J. Ex. 301. (1858) In *Re Hopper*, already referred to, it was held that where each arbitrator had exercised his judgment in the selection of an umpire, and both were agreed as to the fitness of the persons named, they might decide by lot which of the men should be appointed. Where, however, the whole matter is left to chance, it is otherwise.

Powers of Arbitrators.—These have been very considerably extended by the Arbitration Act, 1889. The chief of these are given by sects. 7 and 19. Sect. 7 runs as follows:

“The arbitrators or umpire acting under a submission shall, unless the submission expresses a contrary intention, have power—

- (a) To administer oaths to, or take the affirmations of, the parties and witnesses appearing; and
- (b) To state an award as to the whole or part thereof in the form of a special case for the opinion of the Court; and
- (c) To correct in an award any clerical mistake or error arising from any accidental slip or omission.”

Of these powers, the first two were given previously by 3 & 4 Will. 4, c. 42, s. 41, and Common Law Procedure Act, 1854, s. 5, respectively, but the last is now for the

first time conferred. New powers are also given by sect. 19, which runs as follows:—

“Any referee, arbitrator, or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the Court or a judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference.”

Proceedings.—Though space would not allow a full discussion of the usual mode of conducting proceedings before arbitrators, it will be necessary to refer to the matter to some slight extent for the guidance of professional men who are engaged as arbitrators in cases relating to works or buildings.

The respective parties and their solicitors should be consulted about the time and place of meeting to hear evidence. This being settled, formal notice should be given to the parties and their solicitors, stating the time of meeting. (See *Oswald v. Grey*, and *Hobbs v. Ferrars*.) 24 L. J. Q. B. 69. (1855)
And after due notice, if the time be reasonable, the proceedings may, even though the solicitor of one of the parties cannot attend, go on *in his absence*. 8 Dow. P. C. 779. (1840)

It is only usual to have one counsel on each side, but in cases of importance or difficulty two counsel will be allowed for when taxing costs. (*Sinclair v. G. E. Railway Company*.) L. R. 5 C. P. 135; 39 L. J. C. P. 165. (1870)
The parties should have the fullest possible opportunity of making their case before the arbitrator, and of examining their witnesses.

In *Re Haigh's Estate*, Turner, L. J., remarked that, “before the arbitrator excludes any one from attending on behalf of any of the parties interested, he is bound to ascertain that there is good reason for the exclusion, and to take the best care he can that the party who is affected by the exclusion is not prejudiced by it.” 3 De G. F. & J. 157; 31 L. J. Ch. 420, 422. (1862)

But one witness may be excluded when another is being examined, if the exclusion be not due to corrupt motives. (*Hewlet v. Laycock*.) Witnesses must be sworn 2 C. & P. 574. (1827)

See Arbitration Act,
1889, ss. 7,
22, and
Schedule I (g).
14 & 15 Vict.
c. 99, ss. 2—
16. (1851)

if the submission provides that the evidence should be on oath; but if the submission is silent on the matter, the swearing of the witness is entirely in the discretion of the arbitrators. The witnesses are to be examined in the same manner as in an action, and if they testify falsely are liable for perjury.

McCl. & Y.
160. (1825)

The same rules of evidence are to be observed at arbitrations as in Court (*Att.-Gen. v. Davison*), and if the arbitrators refuse evidence which is legally admissible and tendered by the parties, the Court may revoke the submission. The Court, however, may refuse to revoke if it be satisfied that the arbitrator, on hearing the decision of the Court, will comply with its directions and receive the evidence. (*Hart v. Duke*.) Arbitrators should be very cautious in rejecting evidence, on the ground of its being foreign to the issues, or as being too great in amount.

32 L. J. Q. B.
55. (1862)

16 L. J. Q. B.
330. (1847)

(*In re Marsh*.) Or if the arbitrators refuse to examine a material witness who is tendered, on the ground that there is enough evidence without him, this may invalidate the award. (*Phipps v. Ingram*.)

3 Dow. 669.
(1835)

Where evidence is tendered by one of the parties, and though objected to as being legally inadmissible, the arbitrator receives such evidence, the Court will not, as a rule, on that ground give power to revoke or set aside the award, as an award will not usually show what effect, if any, the arbitrators have given to the evidence objected to. However, a late case on this point seems to go rather in the opposite direction.

L. R. 12 App.
Cas. 738.
(1887)

Kirk and Randall v. The East and West India Docks Company was an appeal by the defendant company from a decision of the Court of Appeal, affirming a finding of the Queen's Bench Division. The plaintiff contractors had, in 1882, entered into a contract with the defendant company to construct certain large docks at Tilbury, on the Thames. A schedule of prices was attached to the contract, and the work actually executed was to be paid for at these prices. The works were then proceeded with, but about July, 1884, disputes arose between the parties. The contractors alleged that the

payments on account were entirely inadequate. They claimed 256,660*l.* in excess of the payments already made, and they demanded arbitration. The contractors reduced their workmen, and thereupon the company gave them notice to proceed with the works, and after some time the company took possession of the works, and finished them by means of other contractors. The contract contained an arbitration clause, providing for disputes, and that any reference thereunder and award should have all the incidents and consequences of a reference and award by a sole arbitrator appointed under the Common Law Procedure Act, 1854, and that the submission should be made a rule of the High Court.

Sir F. J. Bramwell was appointed arbitrator, and at the hearing the plaintiff contractors submitted evidence of information obtained from the engineers of the company prior to their entering into the contract, and which proved inaccurate, and part of their claim was based upon this alleged incorrect information. The dock company objected to the reception of evidence of matters which had occurred before the execution of the contract, and on the arbitrator deciding to receive the evidence, the company moved in Court for leave to revoke the submission. The question eventually came before the House of Lords, when it was held that where an arbitrator is going wrong on a point of law, the Court has jurisdiction to give leave, under 3 & 4 Will. 4, c. 42, s. 39, to revoke the submission, and will exercise the power, unless the parties agree that the arbitrator should raise the questions on a special case. The order ultimately made was substantially that the arbitrator should set out the evidence received which was objected to, his purpose in so receiving it, and the use he made of it in framing his award.

In *James v. James and Bendall*, which came before the Court of Appeal, the plaintiff sought leave to revoke a submission to arbitration, the arbitrator having decided one point in dispute at the request of the parties before making his award. The Court, however, affirmed the decision of the Divisional Court, and refused leave to revoke; Lindley, L. J., observing that the case of *The East and West India Docks Company v. Kirk and Randall* did not, in his opinion, lay down any proposition opposed to the practice of the Court, or applicable to the general run of cases, but was decided under exceptional circumstances, when any other course would have led to enormous expense.

22 Q. B. D.
669; on app.
23 Q. B. D.
12; L. J.
(Q. B.) N. C.
June 8, p. 75.
(1889)

In this connection, it may be well to remember sect. 19 of the Arbitration Act, 1889, already quoted, under which the arbitrator may, and if the Court so direct, must, state in the form of a special case for the opinion of the Court

any question of law arising in the course of the reference. See also sect. 7.

It is often a matter of difficulty for arbitrators to know whether they should reject or receive evidence, which is pressed upon them by one side, and strenuously objected to by the other party. It would appear, however, from the decision of the House of Lords just quoted, that the best course will be to receive such evidence, but subject to the condition that it be set out in the award, and that it also be shown to what extent (if any) it has been used or relied on in making up the award, or the other course may be adopted, of stating a special case for the opinion of the Court.

Time.—A submission to arbitration should expressly fix the period within which the award should be made. As a rule, however, the arbitrators are expressly authorized to extend the time within certain limits. And now, in the absence of any contrary intention expressed in the submission, it shall be deemed to include these provisions as to time:

“The arbitrators shall make their award in writing within three months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators, by any writing signed by them, may from time to time enlarge the time for making the award.

“If the arbitrators have allowed their time or extended time to expire without making an award, or have delivered to any party to the submission, or to the umpire, a notice in writing, stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators.

“The umpire shall make his award within one month after the original or extended time appointed for making the award of the arbitrators has expired, or on or before any later day to which the umpire by any writing signed by him may, from time to time, enlarge the time for making his award.” (Arbitration Act, 1889, s. 2, Sched. I. (c), (d), and (e).)

The three months referred to in the first of these provisions are to be reckoned, when they count from entering on the reference, from the date when the arbitrators enter upon the reference by opening the hearing of the case. See *Baker v. Stephens*.

By sect. 9 of the Arbitration Act, 1889, it is enacted that—

“The time for making an award may from time to time be enlarged by order of the Court or a judge, whether the time for making the award has expired or not.”

A similar provision existed in sect. 15 of the Common Law Procedure Act, 1854, which is now repealed.

By R. S. C. Ord. 64, r. 14a, “Where the time for making an award is enlarged, the enlargement shall be deemed to be for one month, unless a different time is specified in the order.”

Rule of Court.—Formerly it was necessary under certain circumstances to make the submission a rule of Court. The statute of William III., under which this was done, has now been repealed, and by sect. 1 of the Arbitration Act, 1889, already quoted, a submission, unless a contrary intention is expressed therein, shall have the same effect as if it had been made an order of Court.

Award.—In framing an award it is not necessary to make use of technical language (*Eardley v. Steer*); but the award must be definite and clear in its terms. (*Lock v. Vulliamy*.)

L. R. 2 Q. B.
523; 36 L. J.
Q. B. 236.
(1867)

4 Dow. 423.
(1835)
5 B. & Ad.
600. (1833)

Recitals are not necessary in all cases, but when made they should closely follow the submission. It is also competent to attach a map (with written descriptions at bottom) to an award and incorporate it therein. (*Johnson v. Latham*.) The award should be executed with the forms specified in

20 L. J. Q. B.
236. (1851)

the submission "under hand" or under "hand and seal" as the case may be (*Everard v. Patterson*), and one witness is sufficient. If the award is to be signed by two or more arbitrators, they should sign at the same time and in the presence of each other. (*Wade v. Dowling*.) An award is deemed to be made, and published, and ready for delivery to the parties as soon as it has been made, even though no notice has been sent to them of the fact. (*Brook v. Mitchell*.) But the time will count from the date of notice of publication where proceedings are taken to set the award aside. (*Brook v. Mitchell, supra*.) An award must be properly stamped, otherwise it cannot be legally enforced, but it may at any time before application for enforcement be properly stamped. (*Preston v. Eastwood and Hill v. Slocombe*.) The arbitrators must deal in their award with all the matters included in the submission.

6 Taunt. 625.
(1816)

23 L. J. Q. B.
302; 4 E. &
B. 44. (1854)

6 M. & W. 473.
(1840)

7 T. R. 95.
(1797)

9 Dow. 339.
(1841)

3 Bing. N. C.
874. (1837)

Thus, in the case of *Re Rider* it was referred to arbitrators to determine as to claims for extra works and deductions in connection with a building contract; also as to alleged defects in the building, and the balance (if any) due to the contractor. The award was merely for a gross sum of money to be paid to the builder, but it did not deal with the alleged defects, and it was held bad as an award.

But where a cause and all matters in difference were referred, and the arbitrator awarded in settlement of "all matters in difference, accounts, claims, and demands between the parties up to date," a definite sum to be paid by the defendant to the plaintiff, it was held a good award. (*Bradley v. Phelps*.)

21 L. J. Ex.
310. (1852)

27 L. J. C. P.
70. (1857)

Again, in *Roberts v. Eberhardt*, it was held that where the costs of the award and reference were to be in the arbitrator's discretion, and he, being also trustee and receiver of the estate, paid the costs out of the estate, and in the award did not state by whom the costs were to be borne, the award was bad.

Costs.—At common law, an arbitrator has no power over the costs of a reference, unless the submission empowers him to deal with the matter. But now, in the

absence of any contrary intention, a provision will be implied in every submission that the costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid, or any part thereof, and may award costs to be paid as between solicitor and client. Where the submission directs that the costs are to abide the event of the award, the arbitrator should make no reference to the costs in his award. (*Hemsworth v. Brian.*) The costs of the reference include the expenses incurred by the parties in connection with the inquiry held by the arbitrators, and will include the expenses of witnesses examined before the arbitrators. (*Brown v. Nelson.*) The costs of the award are the fees charged by the arbitrators for their own services, including any costs incurred by obtaining legal assistance in preparing the award, and they will be subject to the same rules as the costs of the reference. The arbitrator may direct by the award which party is to pay the arbitrator's fees, or that a moiety is to be paid by each party. But the sum or sums so to be paid should not be expressed in the award. (*Parkinson v. Smith and Threlfell v. Fanshawe.*) When sending notice to the parties that the award has been made and published, the arbitrator should state the total amount of fees payable, and that the award would be handed over on payment of the amount. The award should then be held till the fees are paid. The arbitrator has a lien upon the award and submission in respect of his costs. (*Hoggins v. Gordon and Ponsford v. Swaine.*) Arbitrators may fix their own fees, but the charges must be reasonable. When an unreasonable amount is charged, and a party pays it under the *quasi* compulsion of the

Arbitration
Act, 1889,
s. 2, Schedule I. (i).

1 C. B. 131.
(1845)

13 M. & W.
397; 2 D. &
L. 405. (1844)

30 L. J. Q. B.
178. (1861)
19 L. J. Q. B.
334. 1850.

11 L. J. Q. B.
286. (1842)
1 J. & H. 433.
(1861)

award being withheld, the excess may be recovered back by the party so paying it as money had and received.

20 L. J. Q. B.
178. (1851)

4 Ex. 839.
(1850)

2 H. & N. 569.
(1857)

(*Fernley v. Branson* and *Re Coombe* and *Barnes v. Braithwaite*.) And when the successful party takes up the award, and pays what are exorbitant fees to the arbitrator, he cannot compel the other party to pay the excess amount charged. He can only tax a reasonable fee as against the other party. (*Dossett v. Gingell*.)

2 M. & G.
870; 10 L. J.
C. P. 183.
(1841)

Two cases on arbitrators' fees may be cited at some length. The first of these is

27 L. J. C. P.
70. (1857)

Roberts v. Eberhardt, already mentioned. Here the arbitrator was also the receiver of the partnership estate, with power to dispose of it as he might think best for the parties, and the costs of the reference and award were to be left to his discretion. The arbitrator paid the costs of the reference out of the estate, and he certified in the award that he had deducted the costs of the award out of the money in his hands as receiver. Held, Williams, J., dissenting, that the award was bad—(1) because he had no power to fix his own fees, and pay his own costs out of the money he had as receiver; (2) because the award did not decide by whom the costs were to be paid.

L. R.
20 Q. B. D.
48. (1887)

A later and more important case is that of *Crampton and Hall v. Ridley & Co.* This was an action by an umpire and arbitrator to recover 328*l.* as fees. The facts were as follows: The agreement to refer the matter in dispute to the plaintiffs contained a provision that the costs were "to be in the arbitrators' discretion." Before the arbitrators had disagreed, Crampton was appointed umpire and informed of the terms of the reference. At the first meeting an agreement was come to between the counsel of the parties that "such of them as may be directed by the arbitrators shall pay such costs and charges of the arbitrators as they may direct," and this agreement was reduced into writing. In the result, the umpire directed that each party should pay his or their costs of reference and half the costs of the award, and that if either party should pay in the first instance more than half costs of award, the other should repay him or them so much of the amount as should exceed the half of the costs. One of the parties paid his arbitrator his fees. The other paid nothing. Action was brought by the remaining arbitrator and the umpire against both parties, the arbitrator who received his fees being joined as a defendant. The judge dismissed

the case against the latter, and gave judgment against the bankrupt party for his arbitrator's fees and half the umpire's fees, and against the other party, who had paid his arbitrator, for the other half of the umpire's fees.

This judgment was given on the ground that the facts proved disclosed a special contract binding the parties to pay the arbitrators' and umpire's fees as directed by the award; but during argument the point was raised whether independently of special contract the arbitrator or umpire had any right of action for his fees. It was contended that he had none, and that all he was entitled to was to hold the award until his fees were paid; and several cases were cited tending to support this view. Smith, J., while not deciding the point, expressed a strong conviction that independently of special contract the arbitrator was entitled to recover fair remuneration for his trouble. "In my opinion," he said, "if the point now in hand ever comes to be decided by a Court of review, if that be necessary, it will be held, and I believe the law to be, that upon an arbitration such as we are now dealing with, there is an implied promise by the parties appointing the arbitrators and the umpire jointly to pay them for their services. In my judgment, in the cases above referred to, Courts were not dealing with the class of arbitrators and umpires to which the case in hand applies." In other words, where the Courts had declared that arbitrators were not entitled to an action for fees, the arbitrations had been merely cases of friendly intervention to settle disputes between friends, not attempts to decide on the legal rights and obligations of parties to a business dispute.

It may be mentioned that in the case of *In re Autothreptic Steam Boiler Company* it was held that where upon a reference by consent, but not in a cause, the costs of the reference are left in the discretion of the arbitrator, the costs of negotiating and settling the terms of the submission may be allowed on taxation as "costs of the reference." 21 Q. B. D. 182. (1888)

Also by *In re Walker* it was decided that a power in the submission of awarding the costs of the reference includes a power of awarding the costs of the award. 30 W. R. 703. (1882)

Lastly, by sect. 20 of the Arbitration Act, 1889, it is enacted that "Any order made under this Act may be made on such terms as to costs, or otherwise, as the authority making the order thinks just." 52 & 53 Vict. c. 49.

Remitting Award.—By sect. 10 of the Arbitration Act, 1889, which is substantially a re-enactment of sect. 8 of

the Common Law Procedure Act, 1854, it is declared that :—

“(1.) In all cases of reference to arbitration the Court or a judge may, from time to time, remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire.

“(2.) Where an award is remitted, the arbitrators or umpire shall, unless the order otherwise directs, make their award within three months after the date of the order.”

27 L. J. C. P.
66. (1857) It may be noticed that in *Hodgkinson v. Fernie* it was held that under the Common Law Procedure Act a matter would not be remitted for a defect not appearing on the face of the award and only set forth upon affidavit, and where there has been no misconduct on the arbitrator's part.

Setting aside award.—By sect. 11 of the Arbitration Act, 1889, which reproduces sect. 2 of 9 Will. III. c. 15, substantially, it is enacted that—

“(1.) Where an arbitrator or umpire has misconducted himself, the Court may remove him.

“(2.) Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set the award aside.”

The grounds upon which the Court will act cannot be set out in any well-arranged order, but a few illustrations will prove useful, as indicating the way the Courts have hitherto exercised their jurisdiction in matters of this kind.

Thus, an award was objected to on the ground that the arbitrators had been guilty of misconduct in taking, separately, evidence behind the backs of the parties (*Re Plews and Middleton*), and the Court set it aside.

6 Q. B. 845 ;
14 L. J. Q. B.
139. (1845)

And where the award is uncertain or not final, or does not cover all the matters submitted, the award will not be allowed to stand.

Again, where the arbitrator has exceeded his jurisdiction, the award may be attacked. (*Great Western Railway Company v. Waterford and Limerick Railway Company*.)

50 L. J. Ch.
513. (1881)

But the Court will not interfere on the ground that the arbitrator has made a mistake of law or fact, unless the mistake is patent. (*Payne v. Massey and Sharman v. Bell.*) Nor will the Court discuss the question whether or not the award is contrary to the evidence. (*Re Bradshaw's Arbitration.*)

9 Moore, 666.
(1824)
5 M. & S. 504.
(1825)
12 Q. B. 562;
17 L. J. Q. B.
362. (1848)

It is not a good objection to an award that it is unreasonable or wrong in law or in fact. (*Price v. Price; Faviel v. Eastern Counties Railway Company.*) If, however, a gross mistake has been made by the arbitrator, though not apparent on the face of the award, the Court may interfere on the ground that the mistake is so flagrant as to suggest misconduct on the arbitrator's part (*Ashton v. Pointer*), or where both parties and the arbitrator himself admit the mistake. (*Flynn v. Robertson.*)

9 Dow. 334.
(1841)
2 Ex. 344; 17
L. J. Ex. 297.
(1848)
2 Dow. 651;
38 L. J. C. P.
240. (1834)
L. R. 4 C. P.
324. (1869)

Fraud or concealment of material facts by one or other of the parties, which, if known to the arbitrator, would have led him to make a different award, is a ground upon which the Court will act, and set the award aside. (*South Sea Company v. Bumstead.*)

2 Eq. Ca. Ab.
80.

In the very recent case of *Jones v. Rhondda and Swansea Bay Railway Company and Yockney*, the plaintiff applied for an interlocutory injunction to prevent the defendant company obtaining a certificate or award from the defendant Yockney upon a contract dated 24th March, 1883, and to restrain the defendant Yockney from making or granting any such award or certificate. There was no proof of misconduct on Yockney's part. The ground alleged for the application was that Yockney was the engineer of the defendant company, and as such had determined the contract under a power reserved in it. Held, that though the Court had power to restrain an arbitrator from making an award, yet the ground upon which it interfered was misconduct on the part of the arbitrator. In the present case, the arbitrator agreed upon was the engineer of the company, and, so long as his alleged misconduct amounted to nothing more than fulfilling his duty as such engineer, he could not be prevented from acting as arbitrator.

Law Times,
19th April,
1890.

It should, however, be borne in mind that where the

objections to an award are based on alleged irregularities on the part of the arbitrator, or in the conduct of the proceedings before him, they may come too late, when the award is made, because the party entitled to make the objections may have waived them by continuing to take part in the proceedings.

Ord. LXIV.
r. 14. The time within which proceedings can be taken for setting aside the award is fixed by rule of the Supreme Court, which runs as follows:—

“An application to set aside an award may be made at any time before the last day of the sittings next after such award has been made and published to the parties.”

59 L. J. Ch.
148. (1890)

In *Re Oliver's Executors and Scott*, it was held that rule 7 of Ord. LXIV. is applicable to setting aside awards after expiration of the time limited by rule 14.

By Order LII., rule 1, such an application is to be by motion, and by rule 4 of same order—

“Every notice of motion to set aside, remit, or enforce an award . . . shall state in general terms the grounds of the application; and where any such motion is founded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion.”

Enforcing an Award.—Where the unsuccessful party to a reference declines or neglects to carry out the terms and directions of the award, proceedings become necessary to enforce the award. Formerly, it was in many cases necessary to bring an action for this purpose; but now, by sect. 12 of the Arbitration Act, 1889, “an award on a submission may, by leave of the Court or a judge, be enforced in the same manner as a judgment or order to the same effect.” (See *Re Hammond and Waterton*.)

Law Times,
3rd May, 1890.

As to the manner in which judgments and orders may be enforced, see Rules of Supreme Court, Order XLII.

CHAPTER X.

FAILURE OF CONTRACT.

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Impossibility of Performance.—On the question of impossibility of performance, the considerations differ according as the impossibility existed before or arose after the contract was entered into. In the former case, as a general rule, impossibility of performance is a ground of relief; in the second, generally speaking, it is not.

Where, at the time of contracting, the contract plainly could not possibly be carried out, the agreement is void. Where, however, the impossibility was not plain, it must be known to both parties, to one, or to neither. If known to both, there is no contract. If known to the employer alone, the contractor may obtain relief on the ground of fraud. If known, however, to neither, it is not clear that if the contractor has expressly agreed to perform it, he will not be held liable in damages for failing to carry out his agreement. (See Hannen's, J., remarks in *Jones v. St. John's College*.) Any relief which the contractor could obtain would be on the ground of mistake. L. R. 6 Q. B. 115.

When, however, at the time of contracting, the contract was possible of performance, but subsequently it became

impossible, as a general rule the contractor will be liable for non-performance. At any rate, this will be the case

L. R. 4 Q. B. 131. (1868) where the thing is expressly agreed upon. (See *Ford v. Cotesworth*, already referred to.)

There appear, however, to be two exceptions to this rule—

(1.) Where the impossibility arises through an alteration in the laws of the country.

L. R. 4 Q. B. 180; 38 L. J. Q. B. 98. (1869) The case of *Baily v. De Crespigny* may be cited as an illustration. There the defendant had, in a lease granted to the plaintiff, covenanted that no building should be erected on an adjacent plot of land. This plot was subsequently taken by a railway company under their statutory powers of compulsory purchase, and a building erected upon it. On action on covenant, held, that defendant was discharged.

(2.) Where at the time of contracting it was evident that the contract could not be performed unless a specific thing continued to exist, the destruction of that specific thing through the default of neither party frees the contractor.

L. R. 10 C. P. 271; 44 L. J. C. P. 130. (1875) As an example of this exception, the case of *The Anglo-Egyptian Navigation Co. v. Rennie* may be cited. There the contract was to construct and put into a vessel certain boilers and engines. The price was to be paid by instalments on the engineer's certificate. After some of the work had been done and some of the price paid, the vessel was lost at sea. Held, that the contract was determined from the loss of the ship, and that both parties were excused from further performance. As by the contract, as construed by the Court, the property in the boilers and machinery was not to pass to the plaintiffs until these were actually fixed in the ship, it was held, further, that the plaintiffs were not entitled to them, nor were they permitted to recover the instalments of price already paid, as there had been no failure of consideration on the defendant's part. Ultimately, this case went to arbitration on the suggestion of the judges on appeal.

L. R. 10 C. P. 571.

A third exception to the rule that subsequent impossibility does not excuse non-performance of a contract, is in

the case of personal contracts. Where the contract is for skilled services, and the performance is made impossible by the death of the contractor, the contract is thereby determined. (See Chap. I., "Death of Engineer.") As *See infra*, a rule, however, a building contract is not one of this *p. 225.* description.

Discharge of Contract by Mutual Agreement.—Of course, a contract may be discharged by the parties to it agreeing to discharge it. It is only necessary to observe this distinction: if the agreement to discharge takes place before anything is done on either side in performance of it, the contract—unless it be by deed, in which case the discharge must be by deed—may be discharged by simple oral waiver. If, however, the agreement is part performed on one side, the discharge must be by deed or by substituted agreement.

As an example of a substituted agreement the case of *Ormes v. Beadel* may be referred to. In this case a builder entered into a contract, one of the conditions of which was that if in the architect's opinion progress made was not satisfactory, architect could purchase materials and engage extra workmen, and costs were to be deducted from balance owed to builder. Payment to builder was to be by instalments on architect's certificate. When works were part executed, architect expressed dissatisfaction with rate of progress and refused to certify for further payment. Builder being thus rendered unable to pay his workmen, they became clamorous, and to satisfy them builder went with them to architect's office. There, in consideration of 50*l.*, he, under protest, was induced to agree to give up contract, balance due him for work already done to be decided by an arbitrator mentioned in agreement. Builder attended arbitration, but after award made he filed a bill to have his agreement to give up contract set aside, on the ground that it was obtained by undue pressure. Held, that whether the agreement was so obtained or not, the builder, by acting upon it after undue pressure had ceased, had confirmed it. *30 L. J. Ch. 1. (1861)*

Power to determine.—A very usual clause in building contracts is that under which the employer may put an

end to the contract in the event of the contractor making certain defaults. Thus, it is frequently provided that if the contractor proceeds with the works at such a rate that it becomes evident he cannot finish them within the time of completion, the employer may enter and seize the plant and materials, and take possession of the works and determine the contract. In a similar way, if the contractor executes the works, or any portion of them, in a manner contrary to the terms of the contract, the employer may enter and determine the contract. Provision is made in all cases that due notice of the employer's intention to exercise his power under the contract should be given to the contractor, and the tenor and time of service of this notice are often matters of considerable importance.

There are not many cases in the reports where this power to determine the contract by the employer has come before the Courts; but in most of the cases which have occurred the result has generally been in the contractor's favour.

The two usual grounds for the employer to act upon are delay and bad workmanship on the part of the contractor; but it is often a matter of extreme difficulty to determine where the delay is so serious, or the bad work so great in amount, as to justify the employer in putting an end to the contract. When the contractor actually stops or abandons the works, and refuses to proceed further, there may be full justification for the employer to intervene; but it would appear to require very considerable default on the part of the contractor, other than mere stoppage or abandonment, to justify the peremptory termination of the contract. The Courts lean against forfeitures, and as a rule the employer must have a very strong case to obtain the aid of the Courts.

Though, however, the Courts lean against forfeitures,

still if from the terms of the contract it is clear that the contractor deliberately agreed to a forfeiture under certain contingencies, the Courts will have no option but to enforce that forfeiture when those contingencies arise. It does not matter how oppressive the condition may be, provided the contractor agreed to it, and the employer in enforcing it acted *bonâ fide*.

This appears from the case, already quoted at great length in Chapter VII., of *Stadhard v. Lee*. There the contractor agreed that the contract might be determined by the employer, if he or his agent were dissatisfied with the progress of the works. Under this condition the employer determined the contract. On action brought, there was no allegation that the employer was not dissatisfied or had acted from any other motive than real dissatisfaction with the progress of the works; but it was alleged that his dissatisfaction was unreasonable and capricious. Held that on this statement no action lay.

See p. 158.
32 L. J. Q. B.
75. (1863)

In the case of *Scott v. The Liverpool Corporation* already referred to, the plaintiff was a contractor, and he had entered into a contract with the defendant corporation to execute certain waterworks. The plaintiff did not proceed in a satisfactory manner with the works, and the result was that the corporation gave notice of their intention to determine the contract in accordance with a provision therein. The corporation then entered and took possession, and the contractor then took proceedings against the corporation. It was held that the corporation were justified in the course they took. It must, however, be borne in mind that the decision in this case depended to some extent on the authority to be ascribed under the contract to the certificate of the engineer.

3 De G. & J.
334; 28 L. J.
Ch. 230.
(1858)

Again, in *Davies v. Swansea (Mayor, &c.)*, the plaintiff was a contractor under contract to carry out some works for the defendant corporation. By the terms of the contract, "if the plaintiff from bankruptcy, insolvency, or any cause whatever, should not proceed with the works to the satisfaction of the surveyor, it should be lawful for the defendants, after three days' notice signed by the surveyor, to employ other persons to complete the works; and the deed of contract should, at the expiration of the said notice, be

21 L. T. O. S.
143; 22 L. J.
Ex. 297.
(1853)

void, at the option of the defendants, and the amount already paid to the plaintiff should be considered the full value of the works which should up to that time have been executed, and the materials on the premises should become the property of the defendants without any further payment." After some of the work was executed, but before any instalment of the contract money became payable, the surveyor became dissatisfied with the progress made, and the defendants determined the contract under this power. Held that the avoidance was good, and that the plaintiff was not entitled to any payment for the work already done.

See below.

But though in ordinary cases the Courts will not interfere to protect the contractor from a condition which he has deliberately agreed to, the case will be otherwise when the contractor fails in his part through the default of the employer himself. In the words of Blackburn, J., in *Roberts v. The Bury Improvement Commissioners*, "no person can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself."

In this important case, which has been cited before in connection with another matter (*Roberts v. The Bury Improvement Commissioners*), the facts were as follows:—In the contract, provision was made that the commissioners should be at liberty to determine the contract and take possession of the works in the event of the contractor failing to complete with due efficiency or within the stipulated time. This power was exercised by the defendant commissioners, and the works were taken over. The plaintiff contractor then sued the Board for wrongfully refusing to permit him to complete the contract. The defence of the commissioners was based upon the condition entitling them to determine the contract. In his reply the plaintiff alleged that any delay that had occurred in the execution of the works had been caused by the commissioners and their architect in not supplying drawings, in not setting out the works, and in not defining the lands and roads so as to enable the plaintiff to commence and proceed with the works. The question then was, were the defendant commissioners justified in the course they had taken, or had the plaintiff any cause of action? The case came before the Court of Exchequer Chamber, where the decision of the Court of Common Pleas was reversed; the Court holding that the commissioners were bound to do their part within a reasonable time,

L. R. 5 C. P. 310; 39 L. J. C. P. 129.
(1870)

and that, if they violated this obligation, the contractor would have a cause of action against them for any damages he might sustain, and the commissioners would be precluded from taking advantage of their own breach of contract; and further, that the question whether there had been default or not in supplying the necessary drawings was one of fact to be determined by a jury, and not by the architect who was himself responsible.

The next case deserving reference is that of *The Corporation of Cork v. Rooney*, where the contractor was bound to finish a bridge within a given period. Great delay took place in proceeding with the bridge, and at the rate the contractor was progressing the corporation believed the works would not be completed before the time limited by the Act of Parliament authorizing the work had expired. 7 L. R. Ir. 191. (1881)

The contract was then determined in the manner provided therein, but the contractor would not give up possession nor allow the corporation to enter upon the works.

The corporation thereupon brought this action, and sought an interlocutory injunction to restrain the contractor from preventing them entering upon and completing the works. In his defence, the contractor alleged that delay had been caused by the corporation and their engineer, but the Court found against this allegation. Judgment was given against the contractor, and the injunction granted on the condition that the plaintiffs abide any order as to damages which might afterwards be made.

It would appear as if this case had been settled, as it never reached the hearing of the cause. The contractor's counsel relied strongly upon *Roberts v. The Bury Improvement Commissioners*, but the default proved in that case against the commissioners was absent in the present instance.

It will be noticed that the Corporation of Cork took rather a new departure in this case. They were the plaintiffs; but the fact that their statutory powers were about to expire was a full justification for their reversal of the ordinary course of litigation between employers and contractors.

Another Irish case may be referred to: it is that of *Belfast Waterworks Commissioners v. Anwell & Co.* The contract was for making a large reservoir, and it provided *inter alia* that the work was to be done as specified and to the satisfaction of the engineer of the plaintiffs, and there was the usual power to terminate Belfast News-letter, July, 1887.

the contract in the event of delay or defective workmanship being executed by the contractor.

After the reservoir work had progressed some time, the engineer reported on several occasions that the contractors were proceeding with the construction of the embankment of the reservoir in a manner contrary to the terms of the specification, and in such a way as to render the works unsafe; and though expostulated with, the contractors refused to alter their method of procedure. The commissioners then determined the contract and tried to enter upon the works to take possession, but the contractors resisted. The commissioners then applied for an interlocutory injunction to restrain the contractors from interfering with them in taking possession. The Court granted the injunction with considerable hesitation, Chatterton, V.-C., seemingly taking the view that the contractors were to be allowed a considerable amount of discretion in either carrying out or neglecting the provisions of the specification of the reservoir.

See *supra*.

In this case, as in that of *The Corporation of Cork v. Rooney*, the employers were the plaintiffs, and consequently the whole burden lay upon them of proving breaches of the contract by the contractor. Had the contractors been the plaintiffs, the want of a certificate from the engineer would have, in all probability, prevented them succeeding.

The proceedings, however, did not get beyond the interlocutory stage, as the plaintiffs settled the case by paying the contractors a large sum of money.

Neither this nor the preceding case can be regarded as precedents for employers placed in like circumstances, and in the last case it would appear as if the employers should have waited and allowed the contractors to proceed as plaintiffs. They certainly obtained the injunction sought for, but they paid a high price for it.

L. R. Ir. 6
C. L. 513.
(1880)

In *The Arterial Drainage Company v. The Rathangan Drainage Board*, the plaintiffs had undertaken the construction of certain important drainage works, and their contract with the defendants contained the usual clause entitling the latter to determine the contract in certain eventualities, and take possession of the works.

The works did not proceed so rapidly as the defendant employers thought right; and, after notice, they determined the contract, and entered into possession of the works. The latter were then about one-half executed, and the only default alleged against the contractors was the delay.

The contractors brought an action against the defendant board, claiming a balance of money alleged to be due for work done, and in addition by way of damages.

The case came first before the Court by way of demurrer to certain of the pleadings, the defendant employers relying on the time clause, and their right to determine the contract. On the other hand, the contractors alleged that the lands required for the works had not been handed over to them, and that the lines and levels of the works had not been set out. The defendants demurred to several of the plaintiffs' pleadings, but the Court ruled in favour of the contractors, and the case then went to a jury for trial on its merits.

The last case on this part of the subject that need be referred to is *Kirk and Randall v. East and West India Dock Company*, or, as it is generally known, *The Tilbury Dock Case*, already referred to.

L. R. 12 App.
Cas. 738.
(1887)

The dock company entered into a contract with the plaintiffs for the construction of certain large dock works at Tilbury. The contract provided, *inter alia*, that payments were to be made on account as the works proceeded, and in certain events the company were to be at liberty to determine the contract by notice, and take possession of the works. Disputes arose in the course of some time, the contractors alleging that the payments on account, certified by the company's engineers, were entirely inadequate to the work done, and that large quantities of extra work had been ordered and executed, but not paid for. On the other hand, the company alleged that the quantities of work executed were far below what was necessary to allow of the works being completed within the stipulated period. The company eventually determined the contract by notice, in the manner provided, and took possession of the works. The claims of the contractors and counter-claim of the company were then referred to Sir F. J. Bramwell, as sole arbitrator. The contractors claimed a sum of upwards of 300,000*l.* for balance of value of work done, and for damages. The hearing of the case occupied nearly seven months, with the result that the contractors were awarded a sum of 152,000*l.* odd in full discharge of their claim.

The amount of money involved in this case was very large, but it is merely referred to here to show that employers should only resort to the final remedy of terminating a contract when every other remedy is closed against them, and when they have very strong grounds to go upon.

Notice to Determine.—Where the contract so provides, notice must be given to the contractor of any ground of complaint which the employer has against him, whether it relate to defective workmanship or delay. This notice should follow the terms of the contract, and, so far as possible, recite the matters complained of, and the matters and things which the contractor should do so as to set matters right.

See Appen-
dix II.

10 Ex. 753;
24 L. J. Ex.
128. (1855)

In *Pawling v. Mayor of Dover*, a notice in the following terms was held sufficient:—"I give notice to you to supply all proper and sufficient materials and labour for the due prosecution of the works, and with due expedition to proceed therewith; and further, that if you shall for seven days after the giving of this notice fail or neglect to comply therewith, I shall, as engineer, and on behalf of the corporation, take the works wholly out of your hands."

Of course, such a general form of notice would not do in every case; and it will be much more fair to the contractor, and much safer for the employer, if all the matters complained of be fully particularized, and all required amendments and alterations fully set out.

When the notice to determine the contract relates to the matter of delay, it would appear, from *Walker v. London and North Western Railway Company*, that the notice must be delivered and acted upon before the expiration of the period fixed by the contract for the completion of the work.

L. R. 1 C. P.
D. 518; 45
L. J. C. P. D.
787. (1876)

This was a special case stated for the opinion of the Court. The material facts were as follows: The plaintiffs entered into a contract

with the defendants to construct a dock. One of the terms of the contract was that if the plaintiffs did not proceed with the works to the satisfaction of the defendants' engineer, the defendants had an option of declaring the contract void as far as related to the works, &c., still to be done; in which event all sums then due to the plaintiffs, together with all the implements and materials in their possession and the penalties for non-fulfilment of the contract within the specified time, were to become forfeited to the defendants. The date fixed for completion of the works was 31st August, 1873.

Two other provisions of the contract should be mentioned. The first empowered the defendants, on failure of the plaintiffs to complete by the specified date, to take possession, without notice, of the works, and employ another contractor to finish them. The other provision empowered the defendants' engineer, if at any time he was dissatisfied with the plaintiffs' rate of progress, to use the money due or to become due to the plaintiffs in employing more labour and buying more materials. This latter provision, however, was not to relieve the plaintiffs from proceeding with due expedition.

On 22nd January, 1874, *i. e.*, after the time for completion of the works had expired, the defendants gave notice to the plaintiffs that they avoided the contract, and thereupon they took possession of the works and of the materials and implements of the plaintiffs.

Held, that in the contract the power to avoid the contract and to seize the plaintiffs' plant and material could only be exercised *before* the time fixed by the contract for the completion of the works.

Death of the Employer.—When the employer dies during the execution of works under a contract, to which he is a party, all his rights and liabilities will devolve upon his personal representative. The latter will be bound to allow the contractor to finish the works, and also to pay him any balance which may be due under the contract. In the same way he may proceed against the contractor if the latter makes default in completing his contract, as in *Wentworth v. Cock*. 10 A. & E. 42. (1839)

Death of the Contractor.—Where the contract is for the

M. Q

execution of works or buildings of the usual character, should the contractor die before the completion of the work, his personal representative will take his place. The personal representative is entitled to complete the works, and to receive payment of all balances due on foot of the contract. On the other hand he is liable to finish the works and to discharge all the obligations undertaken by the deceased contractor, and that, too, even though he is not named in the contract. This was the case in

See *supra*.

Wentworth v. Cock.

1 C. & J. 403.
(1831)

And in *Marshall v. Broadhurst*, the testator had contracted to do certain works, but died before he had commenced operations. His executors completed the works, and used his materials; and it was held that the executors were entitled to recover as such; the Court observing: "If a party contracts for himself and his executors to build a house, and then dies, the executors must go on, or they would be liable to damages for not completing the work. If they go on, it is work and labour done by them as executors, they may recover as executors, and the money, when recovered, will be assets in their hands."

3 Bulstr. 30.
(1687)

The case of *Quick v. Ludbarrow*, in which the executors of the deceased builder were held liable to finish the building after the death of their testator, was quoted with approval by Baron Parke when giving judgment in *Siboni v. Kirkman*.

1 M. & W.
418. (1836)

But it would appear that the result would be different where the contract entered into by the deceased builder was one involving the possession and exercise of special skill; as, for instance, where the work to be done under the contract was the erection of a lighthouse, and the contractor died before the completion of the work, it was held that the representatives were not liable to go on, as the work was one involving special knowledge of the sciences. (See unnamed case referred to in *Wentworth v. Cock*.)

See *supra*.

In such a case as this, the contract—*i. e.*, where special skill and knowledge are needed—becomes a personal one,

just as the contract of the engineer or architect is a personal one; and on the death of the contractor, his personal representatives are under no obligation, and, indeed, except the employer agree, have no right to finish the work. (See *Stubbs v. Holyhead Railway Company*.)

L. R. 2 Ex.
311. (1867)
Vide supra,
p. 30.

Bankruptcy of Employer.—In case the employer becomes bankrupt during the progress of the works, his rights and obligations under the contract will devolve upon his assignee or trustee, and the contractor will be entitled to claim against the estate for any balance remaining due to him.

When drawing up contracts, it would be well to insert a clause providing against the bankruptcy of the employer, and in such event providing that the contractor may stop further progress with the works.

Bankruptcy of Contractor.—It is now necessary to refer briefly to the consequences which follow upon the bankruptcy of the contractor during the progress of the works contracted to be executed, and as a general rule it may be taken that the rights which the contractor had under the contract will now pass to the trustee, but the trustee's right to sue will be conditional on his performance of any duty which may devolve upon him as representing the bankrupt. In

Gibson v. Carruthers, the plaintiffs were assignees of Harris, a bankrupt, and they sued the defendant on a contract made with the bankrupt, before bankruptcy, to sell a thousand quarters of linseed at a given price, to be delivered to Harris's ship at Odessa. Declaration alleged that Harris's ship arrived after his bankruptcy at Odessa, and captain was willing to receive the linseed, and that plaintiffs had offered to pay for it; nevertheless, defendant had

8 M. & W.
321. (1841)

refused to deliver it. Plea that plaintiffs had not, within a reasonable time after bankruptcy, given notice to the defendant that they had adopted Harris's contract. Held, that the plea was bad, and that the declaration disclosed a good cause of action.

2 B. & Ad.
727. (1831)

Again, in the case of *Wright v. Fairfield*, a person named Bramwell engaged to build some masonry work, and the defendant undertook to supply the necessary stone. The defendant Fairfield failed to carry out his undertaking, and as a consequence Bramwell could not proceed with his work. The contract with Bramwell was then terminated as provided in the agreement. Bramwell then became bankrupt, and his assignee sued Fairfield for breach of contract in failing to supply the stone required. And it was held, that as the matter affected the bankrupt's property, the plaintiff was entitled to bring the action.

L. R. 8 Ch.
289. (1873)

In *Ex parte Chalmers, In re Edwards*, H. sold 330 tons bleaching powder to Edwards to be delivered 30 tons per month; payment to be made fourteen days after each delivery. All instalments were delivered save the last (December), but the previous one (November) had not been paid for, when on 20th December Edwards declared himself insolvent. On 23rd December H. repudiated the contract. In February Edwards was declared bankrupt. The trustee then brought an action for 150*l.* damages for H.'s refusal to deliver last instalment under contract. Held that H. was entitled after Edwards' declaration of insolvency to receive payment of both last instalments before delivery of the December instalment, and that H.'s letter refusing to carry out the contract did not relieve trustee from the duty of tendering price of the two instalments before claiming damages against H. for non-delivery.

L. R. 10
C. P. 15.
(1874)

In *Morgan v. Bain* this decision was followed. Plaintiffs had on 5th February entered into a contract with the defendants for a certain quantity of iron, instalments of which were to be delivered monthly. By custom of trade first instalment was to be delivered on 1st April, and no demand for delivery was necessary. Plaintiffs gave defendants notice that they were insolvent on 12th March. Defendants thereupon refrained from delivering any iron. A meeting of the plaintiffs' creditors was held on the 5th April, and though contract with defendants was mentioned it was not set forth in the written statement of the plaintiffs' affairs. The creditors accepted a composition of 5*s.* in the pound. On 13th May—the price of iron having risen—the plaintiffs claimed fulfilment of the contract. The defendants refused on the ground that, as the

plaintiffs had failed to fulfil their part of it, it was determined. Held on these facts that there had been a rescission of the contract.

A difficulty arises where the contract is one which, to be properly carried out, needs the bankrupt contractor's personal knowledge and skill. Here the rule is that the trustee cannot claim the benefit of the contract if through the bankrupt's refusal to lend his skill and knowledge it cannot be completed. However, as Mr. Robson observes, "having regard to the provisions of the Bankruptcy Act, 1883, which expressly bind the bankrupt to aid to the utmost of his power in the realization of his property, and the distribution of it among his creditors, and subject him to punishment if he fails to do so, it would seem that the trustee will be entitled to require the bankrupt to give his aid in completing any contract unexecuted at the time of his bankruptcy, at the risk of punishment as for contempt of Court, if being able to comply with the request he refuses to do so."

Robson on
Bankruptcy,
6th ed. (1887),
pp. 409, 410.
Bankruptcy
Act, 1883,
s. 24, sub-s. 3.

But the trustee in bankruptcy may disclaim a contract if he does not consider it beneficial for the estate.

That power is now regulated by sect. 55, sub-sects. 1 and 4 of the Bankruptcy Act, 1883. By sub-sect. 1 the trustee is entitled to disclaim the contract at any time within three months from the date of his appointment as trustee. Sub-sect. 4, however, confers a right on any person interested in a contract under sub-sect. 1 of applying to the trustee to decide whether or not he will disclaim. If within twenty-eight days after receiving such an application, or within such extended period as the Court may allow, the trustee does not disclaim the contract, he shall be deemed to have adopted it. It would seem that in such case he becomes personally liable under the contract should the bankrupt's estate prove insufficient to meet the liabilities arising under it.

Robson on
Bankruptcy,
455.

L. R. 14
Q. B. D. 401.
(1884)

The case of *In re Page* may be mentioned in connection with the question of extending the time for disclaiming. Here the trustee, after the twenty-eight days after application made had elapsed, applied to the Court to have the period extended. The Court granted the application, on the terms that the trustee paid out of his own pocket the costs of the application and the loss arising from the delay.

L. R. 11 Ch.
D. 572. (1879)

Where a contract is disclaimed, the person interested in it becomes a creditor as against the bankrupt's estate for any loss he may thereby have suffered. (*Ex parte Blake.*)

The question often arises, in whom do the materials lying on the ground vest in the event of the contractor becoming bankrupt? Can the employer use them in finishing the building in case he proceeds in this way, or can the trustee claim them?

Many contracts provide that all materials laid upon the ground become the property of the employer, and that no trustee or assignee in bankruptcy, or creditor of the contractor, or any person whatsoever, shall be entitled to interfere, remove, or take away, any such materials.

But conditions like these require to be very carefully worded, otherwise they may run counter to the provisions of the Bankruptcy Acts, and prove invalid. Thus, in the case of

L. R. 14
Ch. D. 19;
28 W. R. 449;
42 L. T. 600.
(1880)

Ex parte Joy, In re Harrison, an owner of land entered into a building agreement with a contractor, the owner undertaking to grant leases upon the erection of certain buildings. The agreement provided that in the event of the builder becoming bankrupt or insolvent, or assigning over his property for the benefit of his creditors, all improvements, materials, and implements on the ground or adjacent thereto . . . should be and become absolutely forfeited to the landowner, and the latter was to be at liberty to re-enter and take possession of the ground, chattels, and effects, and to re-let or sell the same, or otherwise use and enjoy the same, as fully as if this agreement had never been made. The builder eventually filed a liquidation petition, but prior to this he had made no default under the agreement, and at this time there was a considerable

quantity of materials laid upon the ground. The question of the ownership of the materials then came before the Court, when it was held, in the Court of Appeal, that the provision for forfeiture of the materials to the owner, in the event of the builder's bankruptcy, was void, as being contrary to the policy of the bankrupt law.

And in the case of *In re Winter, Ex parte Bolland*, the contract provided that the plant brought upon the works should be "deemed the property" of the employers for the time being, and should not be removed during the progress of the works. The contractor went into bankruptcy, and the employer completed the works, and the plant was sold by consent. It was held, however, that the plant did not become the property of the employers, and the user of the plant by the employers after the suspension of the works was not such a dealing within the meaning of the Bankruptcy Act, 1869, as to entitle the employers to set off the sum received for the plant against the amount due to them by the contractor for breach of contract. (1879)

The result was different, however, in *In re Waugh, Ex parte Dickinson*, where the employer, under a licence to that effect, was entitled to seize materials, on the default or bankruptcy of the contractor, and it was held that the proceeding was protected under the Bankruptcy Act of 1869. (1876)

The question then arises, how can the clause in a contract relating to the plant and materials be so worded as to secure the employer in the event of the bankruptcy of the contractor? and after full consideration of the cases on the subject, it would appear that the proper course is to provide in the contract that all plant and materials laid upon the ground shall immediately vest in the employer, and that payments on account under the progress certificates of the engineer or architect shall include an allowance for all plant and material delivered up to date; and further, that the latter shall not be removeable by any person whatsoever without the consent of the employer.

Thus in *Browne v. Bateman*, the employer was to grant leases for buildings to be erected on his land, and to assist the building operations by periodic advances of money as the buildings progressed; and the contract provided that all materials which should

L. R. 8 Ch.
D. 225; 47

L. J. B. 52;
38 L. T. 362.

(1879)

L. R. 4 Ch.
D. 524; 46

L. J. B. 26;
35 L. T. 769.

(1876)

L. R. 2 C. P.
272; 36 L. J.

C. P. 134; 1
L. T. N. S.

658. (1867)

have been brought upon the premises by the contractor for the purpose of erecting such buildings should be considered as immediately attached to and belonging to the premises, and that no part thereof should be removed therefrom without the employer's consent. It was held that this provision gave the employer such an equitable interest in the materials for the buildings, that they could not be taken in execution by any creditor of the contractor.

Change of Engineer or Architect.—It is generally provided in contracts that the work is to be approved of and certificates issued by a given engineer or architect, who is named in the contract. It is, then, a matter of interest to the contractor to know what his position will be in case of the removal of the engineer or architect by death or resignation, or by the act of the employer. A contractor may be quite willing to carry out a work under the engineer or architect named in the contract, but he might object to be placed in the same position with respect to a successor in office to be nominated by the employer. There is an absence of authority on this part of the subject, but the following observations are submitted.

Firstly, then, so far as relates to the contractor, the employer may dismiss his engineer or architect at any time, and employ a successor. But when the contract provides that the approval of the work by an engineer or architect expressly named in the contract, or the issue of a certificate by him, is to be a condition precedent to the payment of the contractor, and the engineer or architect is prevented by death, resignation, or dismissal, from expressing his approval or issuing his certificate, the contractor is relieved from the condition precedent. In the case of the dismissal of the engineer or architect, the non-fulfilment of the condition as to approval and certificates is due to the act of the employer; and Blackburn's, J., observations in *Roberts v. The Bury Improvement Commissioners* apply with great force that "no person can take advantage of

the non-fulfilment of a condition, the performance of which has been hindered by himself."

It would appear then, that, when a new engineer or architect has been appointed to succeed the person named in the contract, his approval of the work or his certificate is not a condition precedent to payment of the contractor.

If the employer refuses to pay the contractor any money claimed by the latter on foot of his contract, on the ground that the new engineer or architect has not approved of the work, or has not certified for the sum claimed, the contractor may bring his action in the usual way, and the new engineer or architect may appear as a witness for the employer to show that the work has been badly executed, and not in accordance with the contract, but his approval would not be a condition precedent to the right to recover.

But, of course, the contractor would require to come into Court with clean hands. To succeed, he would require to prove that he had done the works in the manner provided by the contract, and that the objections of the employer and the new engineer or architect were unreasonable and capricious. The matter would then be one for the jury, whether as a fact the contractor had carried out the work in the manner contracted for.

APPENDIX I.

ARBITRATION ACT, 1889.

(52 & 53 VICT. c. 49.)

An Act for amending and consolidating the Enactments relating to Arbitration. [26th August, 1889.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same, as follows :

References by Consent out of Court.

1. A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a judge, and shall have the same effect in all respects as if it had been made an order of Court. [See pages 200 and 207.]

Submission to be irrevocable, and to have effect as an order of Court.

2. A submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the First Schedule to this Act, so far as they are applicable to the reference under the submission. [See pages 201 and 206.]

Provisions implied in submissions.

3. Where a submission provides that the reference shall be to an official referee, any official referee to whom application is made shall, subject to any order of the Court or a judge as to transfer or otherwise, hear and determine the matters agreed to be referred.

Reference to official referee.

4. If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that Court to stay the proceedings, and that Court or a judge thereof if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time

Power to stay proceedings where there is a submission.

when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings. [*See page 192.*]

Power for the Court in certain cases to appoint an arbitrator, umpire, or third arbitrator.

5. In any of the following cases :—

- (a.) Where a submission provides that the reference shall be to a single arbitrator, and all the parties do not after differences have arisen concur in the appointment of an arbitrator :
- (b.) If an appointed arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy :
- (c.) Where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him :
- (d.) Where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy :

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator.

If the appointment is not made within seven clear days after the service of the notice, the Court or a judge may, on application by the party who gave the notice, appoint an arbitrator, umpire, or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties. [*See page 201.*]

Power for parties in certain cases to supply vacancy.

6. Where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party, then, unless the submission expresses a contrary intention—

- (a.) If either of the appointed arbitrators refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place ;
- (b.) If, on such a reference, one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent :

Provided that the Court or a judge may set aside any appointment made in pursuance of this section. [*See page 201.*]

7. The arbitrators or umpire acting under a submission shall, unless the submission expresses a contrary intention, have power—

Powers of arbitrator.

- (a.) to administer oaths to or take the affirmations of the parties and witnesses appearing; and
- (b.) to state an award as to the whole or part thereof in the form of a special case for the opinion of the Court; and
- (c.) to correct in an award any clerical mistake or error arising from any accidental slip or omission. [See page 202.]

8. Any party to a submission may sue out a writ of subpoena ad testificandum, or a writ of subpoena duces tecum, but no person shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action.

Witnesses may be summoned by subpoena.

9. The time for making an award may from time to time be enlarged by order of the Court or a judge, whether the time for making the award has expired or not. [See page 206.]

Power to enlarge time for making award.

10.—(1.) In all cases of reference to arbitration the Court or a judge may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire.

Power to remit award.

(2.) Where an award is remitted, the arbitrators or umpire shall, unless the order otherwise directs, make their award within three months after the date of the order. [See page 211.]

11.—(1.) Where an arbitrator or umpire has misconducted himself, the Court may remove him.

Power to set aside award.

(2.) Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set the award aside. [See page 212.]

12. An award on a submission may, by leave of the Court or a judge, be enforced in the same manner as a judgment or order to the same effect. [See page 214.]

Enforcing award.

References under Order of Court.

13.—(1.) Subject to Rules of Court and to any right to have particular cases tried by a jury, the Court or a judge may refer any question arising in any cause or matter (other than a criminal proceeding by the Crown) for inquiry or report to any official or special referee.

Reference for report.

(2.) The report of an official or special referee may be adopted wholly or partially by the Court or a judge, and if so adopted may be enforced as a judgment or order to the same effect.

Power to refer in certain cases.

14. In any cause or matter (other than a criminal proceeding by the Crown),—

- (a.) If all the parties interested who are not under disability consent: or,
- (b.) If the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot in the opinion of the Court or a judge conveniently be made before a jury or conducted by the Court through its other ordinary officers: or,
- (c.) If the question in dispute consists wholly or in part of matters of account;

the Court or a judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before a special referee or arbitrator respectively agreed on by the parties, or before an official referee or officer of the Court.

Powers and remuneration of referees and arbitrators.

15.—(1.) In all cases of reference to an official or special referee or arbitrator under an order of the Court or a judge in any cause or matter, the official or special referee or arbitrator shall be deemed to be an officer of the Court, and shall have such authority, and shall conduct the reference in such manner, as may be prescribed by Rules of Court, and subject thereto as the Court or a judge may direct.

(2.) The report or award of any official or special referee or arbitrator on any such reference shall, unless set aside by the Court or a judge, be equivalent to the verdict of a jury.

(3.) The remuneration to be paid to any special referee or arbitrator to whom any matter is referred under order of the Court or a judge shall be determined by the Court or a judge.

Court to have powers as in references by consent.

16. The Court or a judge shall, as to references under order of the Court or a judge, have all the powers which are by this Act conferred on the Court or a judge as to references by consent out of Court.

Court of Appeal to have powers of Court.

17. Her Majesty's Court of Appeal shall have all the powers conferred by this Act on the Court or a judge thereof under the provisions relating to references under order of the Court.

General.

Power to compel attendance of witness in any part of the United Kingdom,

18.—(1.) The Court or a judge may order that a writ of subpoena ad testificandum or of subpoena duces tecum shall issue to compel the attendance before an official or special referee, or before any arbitrator or umpire, of a witness wherever he may be within the United Kingdom.

(2.) The Court or a judge may also order that a writ of

habeas corpus ad testificandum shall issue to bring up a prisoner for examination before an official or special referee, or before any arbitrator or umpire. and to order habeas corpus to issue.

19. Any referee, arbitrator, or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the Court or a judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference. [See page 203.] Statement of case pending arbitration.

20. Any order made under this Act may be made on such terms as to costs, or otherwise, as the authority making the order thinks just. [See page 208.] Costs.

21. Provision may from time to time be made by Rules of Court for conferring on any master, or other officer of the Supreme Court, all or any of the jurisdiction conferred by this Act on the Court or a judge. Exercise of powers by masters and other officers.

22. Any person who wilfully and corruptly gives false evidence before any referee, arbitrator, or umpire shall be guilty of perjury, as if the evidence had been given in open court, and may be dealt with, prosecuted, and punished accordingly. [See page 204.] Penalty for perjury.

23. This Act shall, except as in this Act expressly mentioned, apply to any arbitration to which her Majesty the Queen, either in right of the Crown, or of the Duchy of Lancaster or otherwise, or the Duke of Cornwall, is a party, but nothing in this Act shall empower the Court or a judge to order any proceedings to which her Majesty or the Duke of Cornwall is a party, or any question or issue in any such proceedings, to be tried before any referee, arbitrator, or officer without the consent of her Majesty or the Duke of Cornwall, as the case may be, or shall affect the law as to costs payable by the Crown. Crown to be bound.

24. This Act shall apply to every arbitration under any Act passed before or after the commencement of this Act as if the arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the Act regulating the arbitration or with any rules or procedure authorised or recognised by that Act. Application of Act to references under statutory powers.

25. This Act shall not affect any arbitration pending at the commencement of this Act, but shall apply to any arbitration commenced after the commencement of this Act under any agreement or order made before the commencement of this Act. Saving for pending arbitrations.

26.—(1.) The enactments described in the Second Schedule to this Act are hereby repealed to the extent therein mentioned, but this repeal shall not affect anything done or suffered, or any right acquired or duty imposed or liability incurred, before the commencement of this Act, or the institution or prosecution to its termination of any legal proceeding Repeal.

or other remedy for ascertaining or enforcing any such liability.

(2.) Any enactment or instrument referring to any enactment repealed by this Act shall be construed as referring to this Act.

Definitions.

27. In this Act, unless the contrary intention appears—

“Submission” means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. [*See page 192.*]

“Court” means her Majesty’s High Court of Justice.

“Judge” means a judge of her Majesty’s High Court of Justice.

“Rules of Court” means the Rules of the Supreme Court made by the proper authority under the Judicature Acts.

Extent.

28. This Act shall not extend to Scotland or Ireland.

Commence-
ment.

29. This Act shall commence and come into operation on the first day of January one thousand eight hundred and ninety.

Short title.

30. This Act may be cited as the Arbitration Act, 1889.

SCHEDULES.

THE FIRST SCHEDULE.

PROVISIONS TO BE IMPLIED IN SUBMISSIONS.

(a.) If no other mode of reference is provided, the reference shall be to a single arbitrator. [*See page 201.*]

(b.) If the reference is to two arbitrators, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award. [*See page 201.*]

(c.) The arbitrators shall make their award in writing within three months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators, by any writing signed by them, may from time to time enlarge the time for making the award. [*See page 206.*]

(d.) If the arbitrators have allowed their time or extended time to expire without making an award, or have delivered to any party to the submission, or to the umpire, a notice in writing, stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators. [*See page 206.*]

(e.) The umpire shall make his award within one month after the original or extended time appointed for making the award of the arbitrators has expired, or on or before any later day to which the umpire by any writing signed by him may from time to time enlarge the time for making his award. [*See page 206.*]

(f.) The parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objection, submit to be

examined by the arbitrators or umpire, on oath or affirmation, in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrators or umpire, all books, deeds, papers, accounts, writings, and documents within their possession or power respectively which may be required or called for, and do all other things which during the proceedings on the reference the arbitrators or umpire may require.

(g.) The witnesses on the reference shall, if the arbitrators or umpire thinks fit, be examined on oath or affirmation. [See page 203.]

(h.) The award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively. [See page 207.]

(i.) The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client. [See page 208.]

THE SECOND SCHEDULE.

ENACTMENTS REPEALED.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
9 Will. 3, c. 15.	An Act for determining differences by arbitration.	The whole Act.
3 & 4 Will. 4, c. 42.	An Act for the further amendment of the law and the better advancement of justice.	Sections thirty-nine to forty-one, both inclusive.
17 & 18 Vict. c. 125.	The Common Law Procedure Act, 1854.	Sections three to seventeen, both inclusive.
36 & 37 Vict. c. 66.	The Supreme Court of Judicature Act, 1873.	Section fifty-six, from "Subject to any Rules of Court" down to "as a judgment by the Court," both inclusive, and the words "special referees or." Sections fifty-seven to fifty-nine, both inclusive.
47 & 48 Vict. c. 61.	The Supreme Court of Judicature Act, 1884.	Sections nine to eleven, both inclusive.

APPENDIX II.

FORMS.

(a) Advertisement for Tenders for Buildings.

TO BUILDERS AND OTHERS.

The undersigned is prepared to receive tenders for the erection of — houses at —, according to the plans and specifications to be seen at his office — between the hours of — and —.

Tenders are to be delivered addressed to the undersigned not later than — o'clock on — day of — next.

Bills of quantities can be obtained on payment of a fee of —, but neither the employer nor the undersigned warrants their accuracy.

The lowest or any tender will not necessarily be accepted.

Dated —.

— Architect.

(b) Form of combined Specification and Agreement used by the late Metropolitan Board of Works. [*See page 49.*]

ARTICLES OF AGREEMENT entered into the — day of — in the year of our Lord one thousand eight hundred and eighty-six. Between — of the one part, and the Metropolitan Board of Works of the other part.

WHEREAS the said — (hereinafter called contractor), proposed to the said Metropolitan Board of Works, in consideration of the payment of the sum of — to be made to — as hereinafter mentioned, to execute the works, to abide by the forms, and fulfil the terms, agreements and provisions hereinafter set forth (that is to say):—

[*Here follows specification of works.*]

GENERAL CONDITIONS UPON WHICH THE WORKS HEREINBEFORE
DESCRIBED ARE TO BE PERFORMED.

1. In this specification the word "*Board*" shall be held to mean the Metropolitan Board of Works; and the word "*Engineer*" shall be held to mean Sir Joseph William Bazalgette, C. B., or other the engineer for the time being duly authorized by the board to act as engineer during the continuance of this contract. [See page 232.]

General
explanation.

2. This contract comprises the formation and completion of the several works, shown upon the plan and section and upon the drawings hereinbefore referred to, and hereto attached. Such drawings and specification are to be considered as explanatory of each other, and should anything appear in the one that is not described in the other no advantage shall be taken of any such omission, and the contractor so to consider in forming — estimate.

3. Should any discrepancies, however, appear, or should any misunderstanding arise as to the meaning or import of the said specification or drawings, or about the quality or dimensions of the materials, or the due and proper execution of the works, or as to the measurement or quality and valuation of the works executed under this contract, or as extras thereupon, deductions therefrom, or as to any other matter or thing whatsoever arising out of this contract, the same shall be explained by the engineer, and his explanation shall be final and binding upon the contractor; and the contractor so to execute the work according to such explanation, and without charge or deduction to or from the contract. [See page 159.]

Discrepancies.

Engineer's
explanation
final.

4. In the event of anything evidently necessary to the due and complete performance of the works being omitted to be shown in the drawings, or described in the specification, through oversight or error, the contractor is, notwithstanding, to execute in the most perfect and complete manner all such works, as if they had been severally shown and described without any extra claim or charge. [See page 160.]

Omissions.

5. The engineer shall have full power and authority from time to time, and at all times, by either himself, or the assistant engineer, to make and issue such further drawings, and to give such further instructions and directions as may appear to him or them, or either of them, necessary or proper for the guidance of the contractor, and the good and sufficient execution of the works according to the terms of this specification; and the contractor shall receive, execute, obey, and be bound by the same, according to the true intent and meaning thereof, and as fully and effectually as though they had accompanied or had been mentioned or referred to in this

Power to vary
works.

Regulation of expenses, prices, &c.	specification; and the engineer, or assistant engineer, may also alter or vary the levels or position of any of the works contemplated by this specification, or the contract, or may order any of the works contemplated thereby to be omitted with or without the substitution of any other works in lieu thereof, or may order any work, or any portion of work executed, or partially executed, to be removed, changed, or altered, and, if needful, that other work shall be substituted in lieu thereof, and the difference of expense occasioned by any such increase, diminution, or alteration, so ordered and directed, shall be added to or deducted from the amount of this contract, agreeably to the rates specified in the contractor's detailed tender or in the schedule of prices, hereto attached, as the engineer may decide; and where the rates are not contained in said detailed tender or schedule of prices, the engineer shall ascertain the amount of such additions or deductions, and for the purpose of preventing doubts, disputes, and litigation, it is to be distinctly understood that the board shall not become liable to the payment of any charge in respect of any such additions, alterations, or deviations, unless the instructions for the performance of the same shall have been given in writing by either the engineer or the assistant engineer, nor unless any such instructions shall distinctly state that the matter thereof is to be the subject of an extra or varied charge, nor unless the claim therefor shall be made in writing by the contractor (such claim to contain the description and quantity of the work done, labour employed, and materials used, and with respect to any work, labour, or material the price for which shall not be determinable by the said detailed tender or schedule, a true and faithful statement of the net prime cost of such materials and labour respectively) within the week in which such work is executed and such materials used, and before the same are placed out of view, or beyond check or measurement, nor unless the value of any altered or varied works, or of any further works, shall, whenever practicable, have been determined and settled before such altered or varied or further works shall have been commenced; such value, in case of dispute, to be ascertained and fixed by the engineer, who shall determine in all cases whether such previous agreement were practicable or not; and in all cases where he shall consider the same to have been practicable the contractor shall not be entitled to make any claim in respect of such altered or varied or further works unless such previous agreement were made. [See page 161.]
Rates which are not in schedule.	
Instructions for alterations to be in writing.	
Weekly vouchers for extras to be sent in by contractor.	
Value of alterations to be assessed by engineer.	
Supply of materials, plant, &c.	6. The contractor, at his own cost and charge, is to provide all materials, engines, machinery, cofferdams, caissons, scaffolding, strutting, shoring, moulds, templates, centres, tools, implements, tackle, utensils and plant of every sort,

kind, quality and description whatsoever; and also all the labour, workmanship, carriage, wages, sheds, coverings, matters and requisites whatsoever that may be necessary for the due and perfect completion of the several works described in this specification, or shown upon the drawings, or which may be implied from them separately or together, or from such additional drawings and directions as may from time to time be furnished by the engineer. All places wherein any materials are being made or obtained for the works, and the whole of the processes connected therewith, and all other the operations of the contractor and tradesmen, shall be open to the inspection and control of the officers of the board, and of all persons authorized by them at all times.

All the materials to be used in and every part of the works are to be subjected to tests from time to time during the execution of the works by such machines, instruments, appliances, or means as the engineer may direct. Tests.

7. The works hereinbefore specified and provided for, or that may be necessary to be done in order to form and complete any part thereof, are to be executed in the best and most substantial and workmanlike manner, with materials of the best and most approved quality of their respective kinds, agreeably to the particulars contained in or implied by the specification, as referred to and represented by the drawings herein referred to, or to such other additional particulars, explanations, and drawings as may be found requisite to be given during the carrying on of the works, and to the full and entire satisfaction of the board and their engineer, according to the instructions and directions which the contractor may from time to time receive from either the engineer, assistant engineer, clerks of works, or persons authorized by them, who shall, and each and every of them shall, have full liberty from time to time, and at all times, to inspect, examine, and test the materials and workmanship, and who shall and may at any and every such time reject any or all of the materials or workmanship which to them, any or either of them, may seem defective or unfit, or improper for the several purposes to which they are applied, or intended to be applied, or not in accordance with the description mentioned or intended by this specification, or the said drawings, instructions, or directions respectively. [See page 155].

Contract, general explanations. Best materials, &c. Additional drawings and instructions. Inspection and testing.

8. The plant, tools, and materials provided by the contractor, shall in all cases, from the time at which they, or any of them, may be brought upon the works and lands of the board, and during the construction, and until the completion of the works, become and continue the property of the board, and the contractor — hereby prohibited from removing the same or any part thereof during the progress of Plant, &c.

the works, without the consent in writing of the engineer, but no advance will be made on either plant or materials. [*See page 230.*]

Contract not to be assigned or underlet.

9. The contractor not to assign or make over this contract to any other person, nor to underlet it, nor to make a sub-contract with any workman or workmen for the execution of any part of the cast iron, wrought iron, steel, or other metal work, timber, brick-work, ground-work, masonry, or any other work appertaining to this contract, but — to employ — own workmen for the labour thereof, who are to be paid by — in wages by the day. And in case the contractor assign or make over this contract, or underlet or make a sub-contract contrary to this agreement, — shall, for each offence, forfeit to the board the sum of 500*l.*, which shall be deemed liquidated and ascertained damages, and may be recovered by action, or deducted by the board from any sum or sums due or to become due to the contractor under this contract or otherwise howsoever; and should the contractor or agent give any gratuity to any officer of the board, the board shall be at liberty to determine this contract. [*See pages 70, 74.*]

Penalty, 500*l.*

Gratuities not to be given.

Works, commencement of.

10. The contractor shall commence the works and carry them on at whatever point or points, and in such portions as the engineer may direct; but none of the works are to be commenced without a written order signed by the engineer. The board will, with the engineer's written order to commence the works, give to the contractor the use of so much of the site of the works as may, in the opinion of the engineer, be required in order to enable the contractor to commence and continue the execution of the works, and will, from time to time, as the works proceed, give the contractor the use of such further portions of such site as the engineer may, from time to time, consider proper in that behalf; but the non-delivery in manner aforesaid of the use of such site, or any part thereof, shall not vitiate or affect the contract, nor any provision therein, or in this specification contained, nor entitle the contractor to any increased allowance in respect of money, time, or otherwise, unless (and then only to the extent to which) the engineer may grant — any extension of time under the provision for that purpose hereinafter contained. [*See page 164.*]

Non-delivery of site.

Extension of time.

Board may occupy site.

11. The board may, for any purpose, and at any time during the continuance of this contract, occupy any part of the site of the works.

Contractor not to commence works on private

12. The contractor shall not commence any work in or upon, across, or through any house, building, shed, yard, area, roadway, ground, garden, or any other place being

private property, until — shall be authorized in writing, either by the board, or their clerk, or engineer, so to do.

13. The contractor shall be responsible for the correctness of the position, levels, and dimensions of the several works according to the drawings and written instructions of the engineer, notwithstanding he may have been assisted by the engineer or the clerk of works in setting out the same; and if at any time during the progress of the works any error shall appear or arise therein, the contractor, on being required so to do by the engineer, shall remove and amend the work to his satisfaction.

The levels shewn upon the plans and sections are supposed to be correct, but the contractor to verify the same, as well as all other particulars of the contract on the ground, should — think fit so to do, as — will be held responsible for the consequences of any error contained therein, or omissions therefrom.

14. The contractor shall give due and sufficient notice to all companies, such as water, gas, or other companies, and also to all surveyors or other persons, and authorities having charge of the water and other pipes, and the highways, roads, streets, foot and carriage-ways, pavements, navigation and the like, previous to, and at the completion of, any work, in order that the proper persons in respect of the matters aforesaid, may be enabled to attend and see that the roads, streets, foot and carriage-way, pavements, and the like and other things incident and appertaining thereto, are secured, relaid or reinstated in a proper and satisfactory manner; and also in order that the proper persons representing the water, gas, and other companies may be enabled to attend and secure, shore up, alter the position of, remove, relay and reinstate the pipes, mains, plugs, and other water and gas works belonging to them, the contractor nevertheless to be held chargeable and responsible for the proper protection and restoration of all and every the matters and things herein referred to. The contractor shall provide such lights, or any such other precautionary expedients and execute such works as the Thames Conservators may order from time to time for the protection of craft, or for the regulation or requirements of the navigation, or otherwise.

15. The contractor to pay all fees and compensations, and to make good at — own expense all damage of every kind which may occur by reason of the execution of the several works for the performance of which the contractor — bound, whether the said damage may occur to any public or private ways, or any other property, work, or thing whatsoever, that may be damaged, removed, disturbed, or injured; and the contractor shall deliver at the office of the board

property
until
authorized.
Setting out
works.

Notice to gas
and water
companies, &c.

Contractor to
pay fees and
make good
damage, &c.

certificates in writing from the proper authorities that all public and private ways, and all property, works, or things that may have been disturbed or injured by the said works, have been properly made good, and all expenses and demands in respect thereof paid by the contractor before payment shall be made of the three amounts, hereinafter provided to be lastly paid, due to — for the works under this contract, as hereinafter mentioned.

16. In any case in which works of shoring, or other works for the protection or security of buildings are necessary, the contractor shall, within a reasonable period before the execution of such works, serve notices on the occupiers of the buildings intended to be shored up or otherwise secured, apprising them respectively that such works are necessary, that — about to execute the same, and will, at a time to be specified in such notice, enter upon the premises for the purpose of executing such works.

Fencings,
hoardings,
watching,
lighting, &c.

17. The contractor is, at his own cost, to provide the requisite gatekeepers, watchmen, fencings, hoardings, strutting, shoring bridge-ways, fenders, lights, signals and defences, and all other matters which may be necessary for the due protection and security of the works, and also for the security and protection of all vessels and craft navigating the River Thames; and all enclosures for materials, or works, for the protection of the public, and of all buildings and property whatsoever, near to or liable to be affected by the works, and shall sufficiently light and watch the same when necessary, and shall properly light and watch all the works. And shall afford the utmost facility for public and private transit in respect of any roads, or rights of way, or rights of traffic which may be interfered with by the execution of the works. As the property required for the purposes of the works is acquired, and the buildings pulled down, the board, through its agent, will fence off such property from the public ways, and upon taking possession of the sites for the construction of the works, the contractor must give notice to the superintending architect of the board, who will ascertain with him the quantity and condition of such hoarding and fencing. Whenever the contractor require any portion of it to be removed, — will give notice to the architect, who will attend and take account of and remove or take charge of it. And the architect will give the contractor certificates of the quantities and the condition of the hoarding and fencing upon the ground, and of that removed therefrom, or taken charge of by him, and the value of any part found to be missing will be deducted from the contract amount. When any part of the new roads are approaching completion, and which are not specified to be protected by a permanent para-

pet of brick or stone, the contractor shall give notice to the superintending architect, who shall protect the said approaches or roads when complete by a temporary timber fence.

18. The contractor to make all necessary provision for the conveyance, both temporary and permanent, of the drainage now discharging through the existing sewers. Provision for drainage.

19. Every precaution is to be taken by the contractor to avoid injury or obstruction to the navigation, and the contractor to be responsible for all such injury and obstruction, and for all damage or loss arising therefrom, or otherwise by or in consequence of these works, and to make good and to satisfy all claims and demands that may arise in respect thereof. Injury to navigation, &c.

20. The contractor shall commence and carry on the works with due diligence, and as much expedition as the board or their authorized officers shall require; and in case the contractor shall fail to do so, or shall neglect to provide proper and sufficient materials, or to employ a sufficient number of workmen to execute the works, which — shall be ordered to execute, with due diligence, or the despatch required, then the board, their clerk, or authorized officers, shall have full power, without vitiating this contract, and they are hereby authorized to take the works, wholly or in part, out of the hands of the contractor, and to engage or employ any other person or workmen, and procure all requisite materials and implements for the due execution and completion of the said works; and the cost and charges incurred by them in so doing shall be ascertained by the engineer, and paid for or allowed to the board, by the contractor; and it shall be competent to the board to deduct the amount of such costs and charges out of any moneys due, or to become due, from them to the contractor under this or any other contract. Expedition in carrying on the works.

[See page 217.] Failing which Board may employ other contractors.

21. Should any materials be brought upon the works, or on the land or property of the board, or to the places where any operations have been or are being carried out in connection with the works, or should there be any of the workmanship which, in the judgment of either the engineer, assistant engineer, clerk of works, or persons authorized by them, shall be of an inferior description and improper to be used in the works, the said materials shall be removed and the workmanship amended forthwith, or within such period or periods as the said officers and persons may direct. In case the contractor shall neglect or refuse to comply with the foregoing conditions, it shall be lawful for either the engineer, assistant engineer, clerk of works, or persons authorized by them, on behalf of the board, and by their agents, servants, Materials and workmanship.

Inferior to be amended.

Proceedings and penalties on refusal.

and workmen, to remove the materials and workmanship so objected to, or any part thereof, and to replace the same with such other materials and workmanship as shall be satisfactory to him or them, and for the board, on the certificate of the engineer, to deduct the expense thereby incurred, or to which the board may be put or be liable, or which may be incident thereto, from the amount of any money which may be or may become due or owing to the contractor, or to recover the same by action at law or otherwise from the contractor, as the board may determine. And the contractor shall also forthwith pay to the board the sum of £50 per day for every day subsequently to the period or periods above specified during which the materials or workmanship, or any part of them, shall not have been removed, such sum of £50 a day to be deemed liquidated damages. [See page 172.]

Proceedings
in case of
defective work
or neglect.

22. The same conditions and penalties as lastly above mentioned shall apply, in the event of the contractor refusing, at — own expense, to pull down, amend, and re-construct any work — may have erected upon an insecure or insufficient foundation, or shall not have sufficiently secured and protected the same against immediate and future injury, whether arising or to arise from weight, pressure, action of water, or otherwise, on being required so to do, by either the engineer, assistant engineer, or clerks of works.

Openings for
examination.

23. Should either the engineer, assistant engineer, or other authorized officers require it for their more perfect satisfaction, the contractor shall at any period during the continuance of this contract, pull down or unship any part of the works, and make such openings, and to such extent, through any part of the said works, as the engineer or officers may direct, and which the contractor shall make good again to their satisfaction. Should the works be found faulty in any respect the whole of the expenses thereby incurred shall be defrayed by the contractor, but if otherwise by the board.

Superinten-
dence.

24. The contractor shall give all necessary personal superintendence during the execution of the said works, and shall constantly employ on each part thereof at least one good and competent foreman, careful and skilled in the trades and callings required by this specification, to manage and direct in the absence of the contractor, and such foreman shall, on behalf of the contractor, receive and have charge of such several drawings, writings, papers, specifications, and documents as may be delivered to or for the use of the contractor, or for — guidance; and such foreman shall also, on behalf of the contractor, receive, execute, and obey all such instructions and directions as may be given by either the engineer, assistant engineer, clerks of works, or authorized persons, and shall not be changed without the consent of the

engineer, but may nevertheless be objected to or dismissed by the engineer, if and when he shall see fit to do so; and thereupon the contractor shall forthwith employ another good and competent foreman in his stead, and so from time to time, and as often as occasion shall require. In like manner the contractor shall employ in and about the execution of the said works, or any of them, only such clerks, foremen, superintendents, agents, and workmen as are careful and skilled in their various trades and callings; and the engineer shall be at full liberty to object to or dismiss any person employed by the contractor in or about the execution of such works, who shall, in the opinion of the engineer, misconduct himself, or be incompetent to, or negligent in, the due and proper performance of his duties or any of them.

Skilled
workmen.

25. In the absence of the engineer, either the assistant engineer, clerks of works, or any other persons whom the board or their engineer shall appoint to superintend the works, are to have full power to decide as to the manner of conducting and executing the works in every particular, and the contractor shall follow the instructions or orders of the persons so appointed. The contractor shall without recompense, claim, or demand, delay or suspend the progress of the works, or any part thereof, if and when and as often as shall be so required by either the engineer, assistant engineer, or clerks of works, and for such time or times as may in the judgment of either the engineer, assistant engineer, or clerks of works, be necessary for the purposes or advantages of the undertaking, and shall, whenever directed by the engineer, assistant engineer, or clerks of works, and upon all other needful occasions, at — own expense, properly cover down and secure so much of the works as may be liable to sustain injury from weather or otherwise; and shall at all times, during the continuance of this contract, and forthwith when required, properly make good any damage or injury which such works, or any part thereof, may sustain, to the full satisfaction of the engineer.

Superinten-
dence in the
absence of
engineer.

Suspension of
progress.

26. The contractor shall take every necessary, proper, timely, and useful precaution against accident or injury to the works, or any of them, or to any other property, or to any person, by the action or pressure of water, and whether the same shall arise from or be occasioned by floods, springs, rain, streams, accumulations, disruptions, leakage, frost, or other natural or artificial causes whatsoever; and shall forthwith repair, make good, and defray any loss, damage, cost, charge, or expense by or in consequence of any accident, or by or in consequence of the operations of the contractor occasioned to the board, or to the said works or any of them, or to any person or persons injuriously affected thereby; and shall

Precautions
against
accidents or
injury.

Board and officers to be indemnified against actions, &c.

indemnify, save harmless, and keep indemnified, the board and their officers from and against the same, and from and against all actions, suits, claims, penalties, liabilities, costs, expenses, and demands whatsoever by reason or on account thereof. And the board may deduct the expenses thereby incurred, or to which the board and its officers may thereby be put or be liable, or which may be incident thereto, from the amount of any money which may be or become due or owing to the contractor, or may recover the same by action at law or otherwise, from the contractor. And the board may if they shall see fit, compromise any such action, suit, or other proceeding, or any claim in respect of any such damage as aforesaid, on such terms as they shall see fit; and the contractor shall thereupon forthwith pay to them the sum or sums paid by the Board upon the occasion thereof, and shall in every case pay to them such sum or sums as shall fully indemnify them according to the present stipulation. [See page 118.]

Board may compromise actions, &c.

Night work.

27. The works are, without extra charge, to be carried on day and night without intermission, should bad or treacherous ground be met with, or should there be any other cause whatsoever which in the judgment of the engineer, shall require it, but no work shall be carried on in the night without the knowledge and sanction of the engineer.

Responsibility for accidents, damages, &c.

28. The care of the whole of the permanent works, until their completion, and of the whole of the temporary works until their removal, is to remain with the contractor, and ——— shall be held responsible for all accidents from whatever cause arising, and chargeable for anything that may be stolen, removed, or destroyed to whomsoever belonging, and shall also be held responsible for the making good of all defects in and damage to the said works, or to the adjoining buildings, premises, and property, from bad or insufficient materials, bad workmanship, or any other cause whatsoever, and whether such damage or defects may be or might have been discovered during the progress of the works or in consequence thereof, or shall appear to be known after the completion thereof, or whether payment may wholly or partially have been made, or the works approved as supposed to have been properly done, and no certificate or approval of any works by any officer or member of the board shall affect or prejudice the right of the board against the contractor, or be considered or held as at all conclusive as to the sufficiency of any works or materials.

Offices, boat, &c.

29. The contractor shall construct and provide, at ——— entire expense, proper working offices for the engineer and his staff at or near the sites to be occupied by the contract works, with proper attendance, to be always at the sole disposition and

the entire use of the engineer, and to be kept for that purpose throughout the whole period that any of these contract works are under execution. The apartments shall be approved by the engineer. The contractor shall also provide a boat, with two qualified boatmen, to be always in attendance on the engineer and his assistants, for inspecting, measuring and levelling, and such other assistance as may from time to time be required.

30. The contractor shall complete and deliver up to the board the whole of the work comprising the new bridge and approaches, and steamboat pier, and shall complete the removal of the temporary footbridge, the fenders, booms, and all other temporary works, within a period of three and a half years from the date of the engineer's order to commence the same, the whole of the work to be delivered up complete in every respect, in a clean and perfect condition. Provided always, that if by reason of the non-possession of any site or sites required for the purposes of the undertakings, or by reason of any additions to or enlargements of the works (which additions or enlargements the engineer is hereby authorized to make), or for any other just cause arising with the said board, or with either the engineer, assistant engineer, or clerks of works, or in consequence of any unusual inclemency of the weather, or general or local strikes, or combination of workmen, or for want or deficiency of any orders, drawings, or directions, or by reason of any difficulties, impediments, obstructions, oppositions, doubts, disputes, or differences, whatsoever and howsoever occasioned, the contractor shall, in the opinion of the engineer, have been unduly delayed or impeded in the completion of ——— contract, it shall be lawful for the engineer, if he shall so think fit, to grant from time to time, and at any time or times, by writing under his hand such extension of time, either prospectively or retrospectively, and to assign such other day or days for, or as for completion, as to him may seem reasonable, without thereby prejudicing or in any manner affecting the validity of the contract, or the sufficiency of the tender, or the adequacy of the sums or prices therein mentioned; and any and every such extension of time shall be deemed to be in full compensation and satisfaction for, and in respect of any and every actual and probable loss or injury sustained or sustainable by the contractor in the premises, and shall in like manner exonerate — from any claim or demand on the part of the board, for and in respect of the delay occasioned by the cause or causes in respect of which any and every such extension of time shall have been made, but no further or otherwise, nor for or in respect of any delay continued beyond the time mentioned in such writing or writings respectively. - [See page 164.]

Time for
completion
of works.

Non-possession of sites,
&c.

Strikes.

Extension of
time.

Delivery
when pro-
visional and
when com-
pleted.

Certificates.

Execution
of works by
board during
continuance
of contract.

Period of
liability.

31. And provided further, that such completion and delivery at the time aforesaid, or at any subsequent time, shall be deemed to be a completion and delivery only if the engineer shall accept the same on behalf of the board, and when so accepted shall not be deemed a full, complete, and sufficient completion and delivery by the said contractor to the board, but only a permissive use of the said works for the purposes of the board, unless and until a certificate in writing under the hand of the engineer, shall have been given to the board, to the effect that the several works constructed by the contractor, and all other the works contracted for and directed to be executed are in a sound, watertight, workmanlike, and complete and useable condition, and that the contractor has in the opinion of the engineer, reasonably fulfilled and completed contract and undertaking. Provided always, and notwithstanding anything contained in this contract, it shall be lawful for the board to undertake and execute by or through other parties, at any period during the continuance of this contract, any kind of work, matter, or thing whatsoever, which they may consider necessary or proper to be formed and executed for the purposes of, and in connection with, any or all of the works under this contract, and that without in any way relieving the contractor from any of liabilities and responsibilities under, or in any way vitiating or avoiding this contract. [*See page 181.*]

32. That the contractor, notwithstanding such permissive use and execution of works, matters, and things lastly provided, and any act, matter, or thing done, permitted, happening, or suffered, in pursuance or during the continuance of such permissive use, or at any period during the continuance of this contract, as lastly provided, shall be responsible for and shall effectually maintain and uphold in good, substantial, sound, perfect, and water-tight condition, all and every part of the said works, for a period of twelve calendar months from and after the day of the date of such last-mentioned certificate, and shall be liable for and shall pay and make good to the board or other person or parties (being legally entitled thereto) all losses, damages, costs, and expenses, they or any of them may incur or be put or be liable to by reason or in consequence of the operations, or of the failure of the works of the contractor, or any of them, during the time the contractor responsible therefor, and shall indemnify, save harmless, and keep indemnified the board from and against the same, and from and against all actions, suits, claims, and demands whatsoever, by reason or on account thereof; or the board may deduct the amount of such losses, damages, costs, or expenses, from any amount in their hands due to the contractor.

33. It shall be lawful for the board, in case the contractor shall fail in the due performance of any part of this undertaking, or shall become bankrupt or insolvent, or shall compound with his creditors, or propose any composition to his creditors for the settlement of his debts, or shall assign this contract, or any benefit thereof, or if the same shall become vested in any other person, or shall carry on his business under inspectors on behalf of his creditors, or shall commit any act of bankruptcy, or shall not, in the opinion or according to the determination of the engineer, exercise such due diligence and make such due progress as would enable the works to be efficiently completed at the time or in the manner aforesaid, to determine the contract, so far as respects the performance of the same under the direction of the contractor, by a notice in writing under the hand of the clerk of the board, but without thereby affecting the obligations, liabilities, and responsibilities of the contractor, the whole of which shall, unless otherwise agreed in writing to the contrary, and except as in otherwise hereinafter mentioned, continue to be in force as fully and to the same extent and for the same period as if the contract had not been so determined, and as if the works subsequently executed had been executed by or on behalf of the contractor, and without thereby creating any trust in his favour, and to enter in and take possession of the works, and of the plant, tools and materials of the contractor, and use or sell the same as the absolute property of the board. And all the powers of the engineer with respect to the determination of any doubts, disputes and differences, and with respect to the settlement of the contract, and the determination of the sum or sums or balance of money to be paid to or received from the contractor, and otherwise in respect of this contract shall be and continue in force with respect to the same as though such contract had not been determined. [See page 227.]

In case of
bankruptcy,
&c.

34. That in case of the contract being so determined as aforesaid, the board may re-let the undertaking of the contractor, or any part thereof, and upon such conditions as they may think fit, from time to time may engage workmen, and provide all such materials, implements, and apparatus, and employ the same in such manner as the engineer, assistant engineer, or clerks of works, or either of them, may think necessary or proper for completing the said works or any of them, or for repairing or remedying, or endeavouring to repair and remedy any defects which may appear therein; and when the contract shall have been so determined, or so soon thereafter as the engineer may think convenient, the engineer shall fix and determine, either *ex parte* or by or after reference to the parties, or either of them, or after such investigation

Re-letting.

or inquiries as he may think fit to make or institute, and shall certify what amount (if any) was at the time of the determination of the contract reasonably earned by or would reasonably accrue to the contractor in respect of the work actually done, and the amount thereof, after allowing for all sums then already paid to the contractor on account, shall remain in the hands of the board, without interest, until twelve months after the date of the engineer's certificate of the final completion of the works as herein provided, and the engineer shall be at liberty to authorize, by his certificate, the board to deduct the damages, losses, costs, charges, and expenses, in his opinion incurred by them, in consequence of the premises, or to which they may be put or be liable, together with the forfeiture (if any) incurred by the contractor, from any sum or sums of money which would otherwise become due and owing to the contractor; and in case such sum or sums of money shall not be sufficient to defray such damages, losses, costs, charges, expenses, and forfeitures, then the contractor shall forthwith pay the deficiency to the board, and it shall be lawful for the board to recover the same from the contractor by action at law or otherwise; and any doubts, disputes, or differences arising or happening with respect to the determination of the contract, or in consequence thereof, shall be settled and decided as hereinbefore prescribed with respect to any other doubts, disputes, or differences arising or happening under the contract.

Penalty for
non-comple-
tion.

35. That time shall be especially considered as the essence of this contract on the part of the contractor, and in case the contractor shall fail in the due performance of the works to be executed under this contract by and at the time or times herein mentioned or referred to, or at other than the day or days to which the period of completion may have been extended, — shall be liable to pay to the board, as and for liquidated damages, the sum of 150*l.* for each and every week which may elapse between the appointed and actual time of completion and delivery hereinbefore mentioned or provided for, or the board may deduct the same from any moneys in their hands due or to become due to the contractor. And such payments or deduction shall not in any degree release the contractor from the further obligations and penalties in respect of the fulfilment of the entire contract, nor any right which the board might have to claim, sue for, and recover compensation and damages for non-performance of this contract at the time hereby stipulated. [*See page 175.*]

Coins, &c.

36. All fossils, coins, or other articles of value or of antiquity which may be discovered in the course of these works shall be immediately delivered into the custody of the engineer or other officers on behalf of the board.

37. The contractor, immediately upon completion of the works, shall fill up all holes and trenches which may have been made or dug; level the mounds or heaps of earth that may have been raised or made, and clear away all rubbish or spoilt bricks which may become superfluous or have been occasioned or made in the execution of the works; and the contractor shall bear and pay all costs, charges, damages and expenses which may be incurred or sustained on account or in consequence of any accident which may happen by means of holes and trenches connected with the works being dug and left unfenced, or materials being left or placed in improper situations.

Filling in
holes, &c.

38. The contractor shall return to the custody of the engineer, at the time of the delivery up of the works of the board, and before — receive the instalments payable thereon, all plans, drawings, writings, papers, specifications, and documents, which may have been delivered to —, or for — use; and in the meantime the engineer, and such party as he may appoint, and the assistant engineer and clerks of works, shall have full access thereto, at all times, and for all purposes, and the same shall be kept at or near the site of the works.

Drawings, &c.
to be returned.

39. The contractor shall maintain the whole of the works executed in perfect repair, and reinstate and make good any defect in, for a period of twelve months after the date of the engineer's certificate of the satisfactory completion of the whole of the work included in this contract.

Maintenance.

40. Within seven days after the contract shall have been executed, the contractor shall deliver to the engineer full and true bills of quantities, with the rates of the charge, amount of each item, and total amount upon which the tender was based, and upon refusal or neglect to do so, shall forfeit to the board 10% per day for every day that such refusal or neglect shall continue beyond the period specified, such sums to be deemed liquidated damages.

Bills of
quantities.

41. That, subject to the conditions in this specification contained, the contractor shall be paid for — work in the manner following, that is to say:—In the first instance no payment shall be made to the contractor until — shall have executed permanent work to the value of 7 per cent. on the full amount of — contract, after which and until — shall have executed work to half the full value of the entire contract — shall be paid at the rate of 90 per cent. upon the value of the work executed, less the aforesaid 7 per cent. After half the work is completed, the contractor shall be paid in full upon the value of the further work executed until its completion. The above 7 per cent. on the contract amount, and the balance of the 90 per cent. payments, shall be retained

Payments.

in the hands of the board until the entire work has been completed, delivered to, and accepted by the board, and until the temporary bridge and all other temporary works have been completely removed, when a sum equal to 25 per cent. thereof shall be paid to the contractor . A second sum of 25 per cent. upon the same amount shall be paid at a period of three months, a third like sum at a period of six months, and the final balance twelve months after such completion as aforesaid, but only on condition that the terms of the contract shall have been fulfilled. The above payments shall be made upon the engineer's monthly estimate of the approximate value of the works executed, and in respect of permanent work only, and no advance shall be made upon plant, or upon materials not forming part of the executed work. Payments shall in no case be made at more frequent than monthly intervals. The labour expended upon the removal of the existing temporary bridge shall be deemed permanent work.

Special conditions as to payment.

42. That the following conditions as to payments shall be specially observed and included with the several other conditions in this specification contained; that is to say, provided always that no sum or sums of money shall be considered to be due and owing, nor shall the contractor make or enforce any demand whatsoever upon or against the board, for or on account of any work executed by —, unless the contractor shall have delivered from time to time, and at all times within one week from the expiration of the month on which the amount of work then claimed for has been performed, a true and proper claim or claims in such form as the engineer may direct; nor unless the engineer shall have certified or recommended the amount to be paid as such instalment or balance to the contractor, and that the contractor reasonably entitled to such instalment or balance respectively; nor shall any such sum or sums of money be considered payable to the contractor until the expiration of seven days from the date of such certificate; nor shall any omission to pay the amount of such certificate at the time the same shall be payable be held or deemed to vitiate or avoid the contract; nor shall the three amounts herein provided to be lastly paid (that is to say, the two last advances to be made and the final balance) be considered to be due and owing at the times above stated, unless that within three months from the date of completion, delivery, and acceptance as aforesaid, the contractor shall have delivered to the board a full account in detail of all claims — ha on the board in respect of the works; and that the engineer shall have a certificate in writing of the correctness of such claims; and provided also that the engineer shall certify that such works have been inspected by him since the expiration of the said period of three months, and found

to be in good and substantial order; and that the contractor has duly delivered to him certificates in writing from the Thames Conservators, and other proper authorities that all works or matters under their control which have been in any way interfered with have been properly reinstated and made good, and all expenses and demands in respect thereof paid by the contractor; and that he also certifies that all claims and demands which have been made for or in respect of damage or loss by, from, or in consequence of the said works, have been satisfied agreeably to this contract, and that he has no reason to believe that any other such claim exists. Provided always, that with respect to any disputed or unadjusted claim or claims the contractor shall not be entitled, before the final settlement of the contract, to any payment, on account or otherwise, unless and until the engineer shall certify the correct amount of such claim or claims, nor unless and until the contractor shall give — receipt in discharge thereof. And provided further, that no certificate or recommendation or payment on general account shall be taken to be an admission of the due performance of the contract, or any part thereof, or of the accuracy of any claim, nor shall it conclude or prejudice the powers of the engineer, or the settlement of the contract, and the determination of the sum or sums or balance of money to be paid or received from the contractor, or in any other way vary or affect the contract entered into by the contractor.

43. That the payment to the contractor shall be made out of the funds under the control of the Metropolitan Board of Works in their public capacity; and that no member of such board, whether or not a party to the contract, shall be personally responsible to the said contractor.

Payments
out of public
funds.

44. That all moneys payable to the board by the contractor under any stipulations in this contract may be recovered by action by the parties for the time being entitled to sue on this contract; or the same may be retained out of any moneys then due, or which may hereafter become due from the board to the contractor under this or any other contract or otherwise howsoever, and the board shall have power to withhold payment of any moneys to the contractor after circumstances shall have arisen which may give rise to such retention as aforesaid, until after the disposal or settlement of such circumstances, though the sum to be retained may be unascertained at the time of such withholding.

Recovery, &c.
of moneys
payable to
board.

45. And further that, notwithstanding anything herein contained, the contractor shall conform and be subject to, and shall comply with, the restrictions and provisions contained in the several Acts of Parliament relating to the board

Acts of Par-
liament to be
complied
with.

to the extent to which they may affect others than the board, or in which others than the board are interested.

[Here follows schedule of prices.]

AND WHEREAS the said Metropolitan Board of Works have accepted the said proposal, the said — executors, administrators, or assigns, being to be paid for the said works as hereinbefore mentioned: NOW THESE PRESENTS WITNESS, that in consideration of such acceptance as aforesaid, and of the payment to be made for the execution and maintenance in repair of the said works for twelve months from and after the day of the date of the engineer's certificate of completion; the said — do hereby, for — heirs, executors, and administrators, covenant and agree with the said Metropolitan Board of Works and their successors, that the said — executors, or administrators, will execute the works mentioned in the said specification in all respects in strict conformity therewith, and in all things fully, completely, and faithfully regard, observe, and perform the said specification, and all the terms, agreements, conditions, and provisions thereof and therein on — part to be regarded, observed, and performed; and that all powers, liberties, rights, and privileges hereinbefore mentioned shall and may be exercised and enjoyed, according to the true intent and meaning thereof. IN WITNESS whereof the said — hereunto set hand and seal, and the said Metropolitan Board of Works have affixed their common seal, the day and year first above written.

Signed, sealed, and
delivered by the said }

(c) Form of Arbitration Clause.

In case any dispute or difference shall arise between the parties to this contract during the continuance or after the completion of the work as to the non-granting of any certificate, or as to the fairness of any certificate granted, or as to any other matter or thing arising out of or connected with this contract, then such dispute or difference shall, on or after the completion of the work, or on or after the determination of the contract, be referred to the arbitration of — civil engineer, or in case of his death, or inability, or unwillingness to act, to some other civil engineer being a member of council,

or past president of the Institution of Civil Engineers, to be appointed on the request of either party by the president for the time being of such Institution, and the said — or other referee shall make his award within — calendar months next after such reference, or before such enlarged time not exceeding — calendar months from the time of such reference as the said — or other referee shall under his hand from time to time appoint; and these presents shall be deemed to be a submission to arbitration within the provisions of the Arbitration Act, 1889, or any statutory modification or re-enactment thereof for the time being in force. [See page 189.]

(d) Notice to Proceed with Works.

To Mr. R. C. P.—

WHEREAS it appears to me that the works contracted to be done by you the said R. C. P., for the mayor, aldermen, and burgesses of the borough of D., by a certain deed, dated the — day of — 18—, and made between you the said R. C. P. of the one part, and the said mayor, aldermen, and burgesses of the other part, are not being properly executed and with due expedition. Now, therefore, I HEREBY GIVE NOTICE to you the said R. C. P. to supply all proper and sufficient materials and labour for the due prosecution of the said works, and with due expedition to proceed therewith; and I further give NOTICE, that if you the said R. C. P. shall for the space of — days after the giving of this notice fail or neglect to comply therewith, I shall, as engineer, and on behalf of the said mayor, aldermen, and burgesses, take the said works wholly out of your hands.

Dated the — day of — 18—.

T. W. R., Engineer.

See *Pauling v. Mayor, &c. of Dover*, 10 Ex. 755; 24 L. J. Ex. 128 (1855).
[See page 224.]

(e) Formal Notice to Determine Contract.

WHEREAS by an agreement dated the — of —, 18—, made between T. A. W. and C. W., therein and hereinafter designated as the said contractors, of the one part, and the — Railway Company, therein and hereinafter designated as the said company of the other part, for the consideration therein appearing, the said contractors covenanted and agreed with the said company to execute a new dock and channel, and works in connection therewith, at Garston near Liverpool, as the same

were set forth and described in the specification, bill of quantities, schedule of prices, and plans in the said agreement referred to, and covenanted and agreed to observe and perform all the covenants and provisions set out in such specification, and that all the powers, rights, and privileges mentioned therein, and conferred thereby in respect of such work, should and might be exercised according to the true intent and meaning thereof: AND WHEREAS by the said agreement it was provided that if the said contractors should not complete the said works within the period limited for that purpose; or if from any cause whatever (not arising from any act or acts done, or omitted to be done, by the said company contrary to the true intent of the said agreement), they should be prevented from or delayed in proceeding with the completion of the said works according to the said specification, it should be lawful for the said company, without any previous notice being given to the said contractors, to take the said works entirely or in part out of their or his hands, and to employ any other contractor or contractors, workman or workmen, either by contract or by measure, or value, or otherwise proceed with the said works and complete the same, and that in such case the said contractors should only be entitled to receive such sums as shall actually have accrued due at the time of the works being taken out of their hands; and all the expenses incurred by so doing shall be deducted and retained from the money due to the original contractors, or shall be recoverable as liquidated damages by action at law or otherwise; AND WHEREAS by the said specification it was also agreed that, should the engineer be at any time dissatisfied with the nature or mode of proceeding with, or at the rate of progress or maintenance of the works, or any part thereof, he shall have full power to procure and make use of all the labour and materials which he may deem necessary, deducting the cost of such labour and materials from the money that may be due, or that may become due, to the contractors. But it was expressly declared that the possession of this power by the engineer should not in any degree relieve the contractors from their obligation to proceed in the execution of, and to complete the works with the requisite expedition, or to maintain them as thereafter mentioned; and it was provided that, should the contractors fail to proceed in the execution of the works in the manner and at the rate of progress required by the engineer, or to maintain the said works as thereafter mentioned to the satisfaction of the engineer, his contract should, at the option of the company, but not otherwise, be considered void as far as relates to the works or maintenance remaining to be done, and all sums of money named as penalties for the non-fulfilment of the contract should be forfeited to the company, and

the amount should be considered as ascertained damages for breach of contract; AND WHEREAS the said contractors have not completed the said works within the period limited for that purpose, and have not been prevented or delayed from proceeding with the completion of the said works according to the said specification by any act or acts done, or omitted to be done, by the said company, but great delay has occurred in the completion of the same; AND WHEREAS the engineer mentioned in the specification is dissatisfied with the nature or mode of proceeding with, and at the rate of progress of the works, and the contractors have failed to proceed in the execution of the works in the manner and at the rate of progress required by the said engineer. NOW THE SAID COMPANY DO HEREBY GIVE THE SAID T. A. W. AND THE SAID C. W., the said contractors, and each of you, NOTICE that they will at the expiration of one week from the date hereof, take the said works entirely out of your hands, and will, if need be, employ other contractor or contractors, workman or workmen, to proceed with the said works and complete the same; and also that the said engineer on their behalf will procure and make use of such labour and materials which he may deem necessary, deducting the cost thereof, as in the agreement provided. And the said company give you further notice that the said contract shall be considered void as far as relates to the works or maintenance remaining to be done, and that the sums of money, materials, implements, and penalties hereinbefore mentioned shall be and hereby are forfeited to the said company.

Dated the — of — in the year of our Lord —.

Signed on behalf of the said company by — Secretary.

See *Walker v. Lond. & N. W. Rail. Co.*, L. R. 1 C. P. D. 528. [See page 224.]

(f) Heads of Conditions of Builders' Contracts.

(Sanctioned by the Royal Institute of British Architects.)

1. The contractors are to provide everything of every sort and kind which may be necessary and requisite for the due and proper execution of the several works included in the contract according to the true intent and meaning of the drawings and specification taken together, which are to be signed by the architect and the contractors, whether the same may or may not be particularly described in the specification

or shown on the drawings, provided that the same are reasonably and obviously to be inferred therefrom, and in case of any discrepancy between the drawings and the specification, the architect is to decide which shall be followed.

2. The contractors are to conform in all respects to the provisions and regulations of the Metropolis Local Management Act and the Metropolis Buildings Act, and to the regulations and bye-laws of the Metropolitan Board of Works and of the local authorities, and they are to give all notices required by the said Acts to be given to any local authorities, and to pay all fees payable under any of the said Acts to any such authorities, or to any public officer in respect of the works.

3. The contractors are to set out the whole of the works, and during the progress of the works to amend, on the requisition of the architect, any errors which may arise therein, and upon request are to provide the necessary appliances, or furnish the necessary vouchers to prove that the several materials are such as are described. The contractors are to provide all plant, labour, and materials, which may be necessary and requisite for the works; all materials and workmanship being the best of their respective kinds; and the contractors are to leave the works in all respects clean and perfect at the completion thereof.

4. Complete copies of the drawings and specification signed by the architect are to be furnished by him or by the measuring surveyor to the contractors for their own use, and the same or copies thereof are to be kept on the buildings in charge of a competent foreman, who is to be constantly kept on the ground by the contractors, and to whom instructions can be given by the architect. The contractors are not to sublet the works, or any part thereof, without the consent in writing of the architect.

5. The architect is to have at all times access to the works, which are to be entirely under his control. He may require the contractors to dismiss any person in the contractors' employ upon the works who may be incompetent or misconduct himself, and the contractors are forthwith to comply with such requirement.

6. The contractors are not to vary or deviate from the drawings or specification, or execute any extra work of any kind whatsoever, unless the same be required to comply with any of the provisions of any of the Acts of Parliament, regulations or bye-laws hereinbefore mentioned, or unless upon the authority of the architect, to be sufficiently shown by any order in writing, or by any plan or drawing expressly given and signed or initialed by him as an extra or variation, or by any subsequent written approval signed or initialed by him. In cases of day work, all vouchers for the same are to be

delivered to the architect or clerk of the works, at latest during the week following that in which the work may have been done, and only such day work is to be allowed for, as such, as may have been authorized by the architect to be so done, unless the work cannot from its character be properly measured and valued.

7. Any authority given by the architect for any alteration or addition in or to the works is not to vitiate the contract, but all additions, omissions, or variations made in carrying out the works, for which a price may not have been previously agreed upon, are to be measured and valued, and certified for by the architect, and added to or deducted from the amount of the contract, as the case may be, according to the schedule of prices annexed, or where the same may not apply at fair measure and value.

8. All work and materials brought and left upon the ground by the contractors, or by their order, for the purpose of forming part of the works, are to be considered to be the property of the employer, when payment shall have been made of the amount of any certificate in which the value thereof shall be included, and in such case the same are not to be removed or taken away by the contractors, or any other person, without the special licence and consent of the architect; but the employer is not to be in any way answerable for any loss or damage which may happen to, or in respect of, any such work or materials either by the same being lost or stolen, or injured by weather or otherwise.

9. The architect is to have full power to require the removal from the premises of all materials which in his opinion are not in accordance with the specification, and, in case of default, the employer is to be at liberty to employ other persons to remove the same without being answerable or accountable for any loss or damage that may arise or happen to such materials; and the architect is also to have full power to require other proper materials to be substituted; and, in case of default, the employer may cause the same to be supplied, and all costs which may attend such removal and substitution are to be borne by the contractors.

10. Should any of the works be, in the opinion of the architect, executed with improper materials or defective workmanship, the contractors are, when required by the architect, during the progress of the work, forthwith to re-execute the same, and to substitute proper materials and workmanship, and, in case of default of the contractors in so doing within a reasonable time, the architect is to have full power to employ other persons to re-execute the work, and the cost thereof is to be borne by the contractors.

11. Any defects, shrinkage, and other faults, which may

appear within — months from the completion of the building, and arising out of defective or improper materials or workmanship, are, upon the direction of the architect, to be amended and made good by the contractors at their own cost, unless the architect shall decide that they ought to be paid for the same, and, in case of default, the employer may recover from the contractors the cost of making good the works.

12. The contractors are to insure the building against loss or damage by fire in an office to be approved, in the joint names of the employer and contractors, for half the value of the works executed, until it shall be covered in, and thenceforth until completion in three-fourths of the amount of such value, and are, upon request, to produce to the architect the policies and the receipts for the premiums for such insurance. All moneys received under any such policies are to be applied in or towards the rebuilding or reparation of the works destroyed or injured. In case of neglect the employer is to be at liberty to insure and deduct the amount of the premiums paid from any moneys payable to the contractors.

13. The building, from the commencement of the works to the completion of the same, is to be under the contractors' charge; they are to be held responsible for, and to make good, all injuries, damages and repairs occasioned or rendered necessary to the same by fire or causes over which the contractors shall have control, and they are to hold the employer harmless from any claims for injuries to persons or for structural damage to property happening from any neglect, default, want of proper care or misconduct on the part of the contractors, or of anyone in their employ, during the execution of the works.

14. The employer is at all times to have free access to the works, and is to have full power to send workmen upon the premises to execute fittings and other works not included in the contract, for whose operations the contractors are to afford every reasonable facility during ordinary working hours, provided that such operation shall be carried on in such a manner as not to impede the progress of the works included in the contract, but the contractors are not to be responsible for any damage which may happen to or be occasioned by any such fittings or other works.

15. The contractors are to complete the whole of the works (except painting and papering, or such other works as the architect may desire to delay), within — calendar months after the commencement of the same, unless the works be delayed by reason of any inclement weather, or causes not under the contractors' control, or in case of combination of workmen, or strikes, or lockout, affecting any of the building trades, for which due allowance shall be made by the architect, and then

the contractors are to complete the works within such time as the architect shall consider to be reasonable, and shall from time to time in writing appoint, and, in case of default, the contractors are to pay or allow to the employer as and by way of liquidated and agreed damages, the sum of £—— per week for every week during which they shall be so in default, until the whole of the works (except as aforesaid) shall be so completed, provided the architect shall in writing certify that the works could have been reasonably completed within the time appointed.

16. If the contractors shall become bankrupt, or compound with or make any assignment for the benefit of their creditors, or shall suspend or delay the performance of their part of the contract (except on account of causes mentioned in Clause 15, or on account of being restrained or hindered under any proceedings taken by parties interested in any neighbouring property, or in consequence of not having proper instructions for which the contractors shall have duly applied), the employer, by the architect, may give to the contractors or their assignee or trustee, as the case may be, notice requiring the works to be proceeded with, and in case of default on the part of the contractors or their assignee or trustee for a period of —— days, it shall be lawful for the employer, by the architect, to enter upon and take possession of the works, and to employ any other person or persons to carry on and complete the same, and to authorize him or them to use the plant, materials, and property of the contractors upon the works, and the costs and charges incurred in any way in carrying on and completing the said works are to be paid to the employer by the contractors, or may be set off by the employer against any moneys due, or to become due, to the contractors.

17. When the value of the works executed and not included in any former certificates shall from time to time amount to the sum of £——, or otherwise, at the architect's reasonable discretion, the contractors are to be entitled to receive payment at the rate of 80 per cent. upon such value until the difference between the percentage and the value of the works executed shall amount to —— per cent. upon the amount of the contract, after which time the contractors are to be entitled to receive payment of the full value of all works executed and not included in any former payment, and the architect is to give to the contractors certificates accordingly, and when the works shall be completed, or possession of the building shall be given up to the employer, the contractors are to be entitled to receive one moiety of the amount remaining due, according to the best estimate of the same that can then be made, and the architect is to give to the contractors certificates accordingly, and the contractors are to be entitled to receive the

balance of all moneys due or payable to them under or by virtue of the contract within — months from the completion of the works, or from the date of giving up possession thereof to the employer, whichever shall first happen. The contractors are to be entitled to receive any sum reserved for painting and papering or otherwise on the completion thereof. Provided always that no final or other certificate is to cover or relieve the contractors from their liability under the provisions of Clause No. 11, whether or not the same be notified by the architect at the time or subsequently to granting any such certificate.

18. A certificate of the architect, or an award of the referee hereinafter referred to, as the case may be, showing the final balance due or payable to the contractors, is to be conclusive evidence of the works having been duly completed, and that the contractors are entitled to receive payment of the final balance, but without prejudice to the liability of the contractors under the provisions of Clause No. 11.

19. If the employer shall make default in paying any moneys to which the contractors may become entitled, for — days after the amount thereof shall have been certified, or if the works be delayed for — months by or under any proceedings taken by any other parties, the contractors are to be at liberty to suspend the works, and to require payment for all works executed and all materials wrought up, and for any loss which they may sustain upon any goods or materials purchased for the works, and in such case the contractors are not to be bound to proceed further with the works contracted for. The contractors are to be entitled to such interest and at such rate as the architect shall certify upon all moneys payable to the contractors, payment of which may have been unduly delayed.

20. Provided always that in case any question, dispute, or difference shall arise between the employer, or the architect on his behalf, and the contractors as to what additions, if any, ought in fairness to be made to the amount of the contract by reason of the works being delayed through no fault of the contractors, or by reason or on account of any directions or requisitions of the architect, involving increased cost to the contractors beyond the cost properly attending the carrying out the contract according to the true intent and meaning of the signed drawings and specification, or as to the works having been duly completed, or as to the construction of these presents, or as to any other matter or thing arising under or out of this contract except as to matters left during the progress of the works to the sole decision or requisition of the architect under Clauses Nos. 1, 9, and 10, or in case the contractors shall be dissatisfied with any certificate of the architect under Clause No. 7, or under the proviso in Clause

No. 15, or in case he shall withhold or not give any certificate to which they may be entitled, then such question, dispute or difference, or such certificate, or the value or matter which should be certified, as the case may be, is to be from time to time referred to the arbitration and final decision of —, architect, or in the event of his death or unwillingness to act, then of*—, architect, or in the event of his death or unwillingness to act, then of an architect being a Fellow of the Royal Institute of British Architects, to be appointed on the request of either party by the president for the time being of such institute, and the award of such referee is to be equivalent to a certificate of the architect, and the contractors are to be paid accordingly.

* This blank should be filled in with the name of a Fellow of the Institute.

21. Upon every or any such reference the costs of and incidental to the reference and award respectively shall be in the discretion of the referee or arbitrator who may determine the amount thereof or direct the same to be taxed, as between solicitor and client, or as between party and party, or otherwise, and may award and direct by whom and to whom and in what manner the same shall be borne and paid, and this submission may be made a rule of any Division of the High Court of Justice upon the application of either party, who may instruct counsel to consent thereto for the other party without any notice being given to such party.

J. MACVICAR ANDERSON, *Hon. Sec.*
WILLIAM H. WHITE, *Sec.*

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